

(20,885.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 193.

PAUL A. WEEMS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

INDEX.

	Original.	Print.
Record from court of first instance.....		11
Complaint.....	1	1
Order that order of arrest issue.....	4	3
Order of arrest.....	5	3
Demurrer to complaint.....	6	4
Order overruling demurrer.....	8	5
Decision and sentence.....	9	5
Appeal to supreme court.....	17	10
Decision of supreme court	18	10
Stipulation to omit evidence from record.....	25	15
Assignment of errors.....	26	15
Exception to decision.....	27	16
Order allowing exception.....	28	16
Motion for new trial.....	29	16
Order denying motion for new trial.....	31	17
Exception to final judgment.....	32	18
Order allowing exception.....	33	18
Petition for writ of error	34	19
Assignment of errors.....	36	19
Writ of error and allowance.....	38	20
Citation and service.....	40	21
Bail bond.....	41	22
Clerk's certificate as to suing out writ of error	43	23
Clerk's certificate to record	44	23



1 UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance for the City of Manila.

THE UNITED STATES, Plaintiff,
vs.
PAUL A. WEEMS, Defendant.

Complaint.

Falsification of a Public Document by a Public Official.

The undersigned accuses Paul A. Weems of the crime of falsification of a public document by a public official, committed as follows:

That on or about the 22nd day of June, 1904, in the City of Manila, Philippine Islands, the said Paul A. Weems, then and there, a public official of the United States Government of the Philippine Islands, to wit: a duly appointed qualified and acting Disbursing Officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands, did, then and there, wilfully, unlawfully, feloniously, and with deliberate pre-meditation, abuse of confidence and by taking advantage of his official position, aforesaid, corruptly and with the intent, then and there, to deceive and defraud the said United States Government of the Philippine Islands, and its officials, falsify a public and official document, namely, a cash book of the Captain of the Port of Manila, Philippine Islands, and the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands, kept by the said Paul A. Weems, as Disbursing Officer of the said Bureau of Coast Guard and Transportation, as an official record and document of his office, aforesaid, and the office of the Captain of the Port of Manila, Philippine Islands, and the office of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands, for the purpose of recording and keeping a record therein of the receipts and disbursements in the

2 said Bureau of Coast Guard and Transportation, made by the said Paul A. Weems, as said Disbursing Officer; in this, that the said Paul A. Weems did, then and there, pervert the truth in the narration of the facts contained in said record, document and cash book, in that he did, then and there, insert and write in said document, record and cash book, on folio or page 190 thereof, and on the second blue line from the bottom of said page or folio, under date of June 22, 1904, in the column for voucher number, the figures "29," and in the column or blank space left to indicate and make a record of the person to whom money was paid by the said Paul A. Weems, as said Disbursing Officer, ditto marks below the words "pay roll" written on the 11th blue line from the bottom of said page, and in the column and blank space for recording for and

on what account money was paid out by the said Paul A. Weems, as said Disbursing Officer, the words "Capul, Apr. and May," and in the column and blank space prepared for the recording of the amounts paid by said Paul A. Weems, as said Disbursing Officer, on account of light house service, Bureau of Coast Guard and Transportation, the figures "204" in the dollars column, and the figures "00" in the cents column, and in the column of "Totals Disbursed" the figures "204" in the dollars column, and the figures "00" in the cents column; and on the first blue line from the bottom of the page in the column of voucher numbers, the figures "30," and in the column or blank space left to record to whom money was paid by the said Paul A. Weems, as said Disbursing Officer, ditto marks below the words "pay roll" written on the 11th blue line from the bottom of said page, and in the column and blank space for recording for what account money was paid out by the said Paul A. Weems, as said Disbursing Officer, the word "Malabriga" and ditto marks under the word "May" written on the 2nd blue line from the bottom of said page, and in the column and blank space prepared for the recording of the amounts paid out and disbursed by the said Paul A. Weems, as said Disbursing Officer, on account of light house service, Bureau of Coast Guard and Transportation, the figures "408" in the dollars column, and the figures "00" in the cents column, and in the column of "Totals Disbursed" the figures "408" in the dollars column, and the figures "00" in the cents column; thereby, and by such entries causing said document, record and cash book to state and show on its face that the said Paul A. Weems, as said Disbursing Officer, had on the 22nd day of June, 1904, paid out and disbursed on account of the Capul Light House Pay Roll, voucher No. 29 for the month of June, 1904, as wages of the employees of the light house service of the United States Government of the Philippine Islands, at the said Capul Light House, the sum of 204 Pesos, Philippine Currency, and on account of the Malabriga Light House pay roll, voucher No. 30 for the month of June, 1904, as wages of the employees in the light house service of the United States Government of the Philippine Islands, at said Malabriga Light House, the sum of 408 Pesos, Philippine Currency, when in truth and in fact the said Paul A. Weems had not, as said Disbursing Officer, nor in any other capacity, paid out nor disbursed, on said 22nd day of June, 1904, or on any other date, 204 Pesos, Philippine Currency, on voucher No. 29, nor 408 Pesos, Philippine Currency, on voucher No. 30, nor had he paid out the said sums or any part thereof on any account; except that he had paid out the sum of 204 Pesos, Philippine Currency, on account of voucher No. 30; all contrary to law.

(Sgd.)

A. M. EASTHAGEN.

Subscribed and sworn to before me and in my presence, in the City of Manila, Philippine Islands, this 23rd day of November, 1904, by the said A. M. Easthagen.

(Signed)

MANUEL ARAULLO,
Court of First Instance, Manila, P. I.

4 UNITED STATES OF AMERICA,
Philippine Islands:

Court of First Instance for Manila.

Part I.

Criminal Cause, No. 1913.

THE UNITED STATES
versus
PAUL A. WEEMS.

There appearing a complaint filed by A. M. Easthagen against Paul A. Weems;

Considering the result of the investigation carried on in the presence and with the intervention of the Prosecuting Attorney of the City of Manila, and being satisfied that the crime of falsification of a public document by a public official as alleged in said complaint has been committed, and there being reasonable grounds to believe that it has been committed by the said accused;

It is hereby ordered that an order of arrest issue for the arrest and detention of Paul A. Weems, and that he be informed of the accusation.

Manila, November 29, 1904.

(Sgd.) MANUEL ARAULLO,
*Judge of the Court of First Instance
of the City of Manila, P. I., Part I.*

5 UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance of Manila.

No. 1913.

THE UNITED STATES
versus
PAUL A. WEEMS.*Order of Arrest.*

To any Officer of the Law:

You are hereby ordered to arrest Paul A. Weems, who is said to be in Manila, and who has been accused before me of the crime of falsification of a public document by a public official, and bring him to my presence as soon as possible, in order to deal with him according to what the law orders.

Manila, November 29, 1904.

(Sgd.) MANUEL ARAULLO,
*Judge of the Court of First Instance
of the City of Manila, Part I.*

[SEAL OF COURT.]

6 UNITED STATES OF AMERICA,
Islas Filipinas:

In the Court of First Instance for the City of Manila.

No. 1913.

THE UNITED STATES, Plaintiff,
versus
PAUL A. WEEMS, Defendant.

Falsification of a Public Document by a Public Official.

Demurrer.

Comes now the defendant in the above entitled cause and demurs to the complaint for the following reasons:

1. That the facts charged in the complaint do not constitute a public offense.
2. That the complaint is vague, and it is impossible to deduce therefrom the facts upon which the accusation for the crime of falsification of a public document by a public official is based.
3. The complaint is not drawn up in such a way that a person of average intelligence could understand what is alleged therein.
4. It is impossible to understand the accusation from the vague narration in the complaint of the facts as to the entries and falsifications therein complained of.
5. A copy of the falsified documents has not been inserted in the complaint, nor has a copy of the same been attached thereto.

Manila, December 2, 1904.

(Sgd.)

W. A. KINKAID,
Attorney for Defendant.

Received copy, Dec. 2, 1904.

(Sgd.) CHAS. H. SMITH,
Prosecuting Attorney.

Filed on the 2d. day of December, 1904.

(Sgd.) C. A. SOBRAL,
Assistant Clerk Court First Instance, Manila, P. I.

8 UNITED STATES OF AMERICA,
Philippine Islands:

Court of First Instance for Manila.

Part I.

Criminal Cause, No. 1913.

THE UNITED STATES
versus
PAUL A. WEEMS,

Falsification of a Public Document by a Public Official.

Order.

The demurrer interposed to the complaint by the counsel for the accused having been heard, and taking into account that the facts stated in the complaint, just as they appear to have been narrated in the same, do constitute an offense; that the complaint is not vague and that the same is drawn up in conformity with the substantial requisites prescribed by the law, and in such a way that a person of average intelligence could understand what is alleged therein; and lastly, that it was not necessary to insert in the same the whole document which is said to have been falsified, nor to attach thereto a copy of said document, the description and detailed outline which is made of the same and the narration of the fact which constituted the falsification at bar are sufficient, so that from all of it the representative of the accused can understand the same.

Said demurrer is overruled, and the defendant is ordered to plead to the complaint.

Manila, December 10, 1904.

(Sgd.)

MANUEL ARAULLO,
*Judge of the Court of First Instance
for Manila, P. I., Part I.*

9 UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance for Manila,

Part I.

Criminal Cause, No. 1913.

THE UNITED STATES
versus
PAUL A. WEEMS.

Falsification of a Public Document by a Public Official

Sentence

It was proved at the trial that Paul A. Weems being a public official or official paymaster, with the title of Disbursing Officer of the

Bureau of Coast Guard and Transportation of the Government of the United States in these Islands; having as such, and by reason of said position, a book known as a cashbook pertaining to the same Bureau, which Bureau was then a part of the Office of the Captain of the Port of Manila; and it being the duty of said accused to disburse and pay the salaries of the employees of the lighthouses of this Archipelago, and he having received from the Insular Treasury the funds necessary to make such payments, made an entry on page 190 of the said cashbook under date of June 22d, 1904, relating to the said payrolls, to the effect that he had paid the sum of 204 pesos on one hand and 408 on the other for the salaries of the employees of the lighthouses of Capul and Malabrido, respectively, for the month of April and May, which was not true, because certain employees of the lighthouses of Capul and Malabrido who should have participated in those sums, received their salaries some months afterward, or, that is, in the month of September of the same year, 1904.

It was proved therefore, that a false entry was made in the 10 said cashbook, because on the 22d of June, 1904, the payments due said employees had not been made, although they were made sometime thereafter, or in the month of September. The entries in those books relating to payrolls Nos. 29 and 30 were false in that it there appeared that these payments were made on June 22d, 1904.

Much has been contended during the trial by counsel for the accused and for the Government in their respective written and oral briefs, with respect to the weight that should be given to the facts proved at the trial. Of course, it is evident that there has been a falsification, that that falsification was committed in the entries made under date of June 22d, 1904, in the aforesaid cashbook, in reference to payments made in June 22d, 1904, in relation to the payrolls corresponding to Nos. 29 and 30 of the lighthouses at Capul and Malabrido. But in order to determine if that falsification falls within the provisions of Sec. 300 of the Penal Code, it is necessary to determine if the accused was a public official when he committed the act, if the document was a public or an official one and if the accused in executing or committing such act abused his official position.

Sec. 401 of the Penal Code says that for the purposes of Title III and of the preceding ones of Book II of the said Code, all those who by the immediate provisions of the law or by popular elections or appointment by competent authority take part in the exercise of public functions, shall be taken for public officials.

No evidence was introduced in the trial of the cause as to whether the accused was appointed by competent authority to the position of Disbursing Officer for the *the* aforesaid Bureau of the Government of the United States in these Islands but this proof was not 11 necessary for the prosecution to make, for, according to No.

13 of Sec. 334 of the Code of Civil Procedure, one of the presumptions *juris tant* is that a person who holds a public office has been duly appointed or elected. To take away that presumption

it would have been necessary for the defense to prove that Paul A. Weems had not been appointed by competent authority to the aforesaid position. But since that presumption above-mentioned exists and also the settled fact that said accused had taken charge of the Office of Disbursing Officer in said Bureau of the Government, it is evident that in accordance with the provisions of said Sec. 401,—perfectly applicable to the case at bar for the purposes of the aforesaid Sec. 300 of the Penal Code,—the accused Paul A. Weems should be taken for a public official. It is not necessary, therefore, to go into a discussion as to whether the accused was an executive, legislative or judicial official, for the reason that the express provisions of the Penal Code and the acts performed by said accused being decided upon, it is not to be doubted that he was a public official in the administrative department of the Government of the United States in these Islands.

Is the cashbook in which the false entries were made a public or official document? Undoubtedly it is. Let us apply Sec. 229 of the Code of Civil Procedure or Sec. 579 of the former Code of Civil Procedure (*Ley de Enjuiciamiento Civil*), which give the definition of solemn public documents or official documents, and we can do no less than admit that the aforesaid cashbook partakes of the character last described, or that of a public document.

Said book is a record of the acts performed within a public office, kept in the same by a public official; it is a document especially 12 destined for the making of official entries in the same, by which the Disbursing Officer must show how the sums in hands for distribution among the several divisions or lighthouses of the Bureau of Coast Guard and Transportation have been used. It is, furthermore, a document which is placed in charge of a public official on account of its nature, and under all these circumstances said book is an official document. It is also evident that the falsification was committed by the accused in abuse of his office for he was in charge of said book, the same having been entrusted to him, and he ought to have entered in the same with all faithfulness the payments made by him, and in stating in making false entries he undoubtedly abused his office.

The fact, therefore, proved at the trial constitutes the crime of falsification of public document by a public official, provided for and punished in Sec. 300 of the Penal Code.

It has been alleged, however, by the defense that no fraud had been committed in relation to the State, nor in relation to the employees to whom the salary appearing in those entries belonged, that there was no damage caused to one nor to the others and, therefore, the crime was not punishable.

In the case at bar no discussion is made about the falsification of a private document, in which it is necessary that the falsification should have been committed to the damage of a third party or with the intention of causing said damage. The Law does not require the concurrence of these circumstances to punish the crime of falsification of a public document, because it takes into consideration the essential difference which exists between these two classes of docu-

13 ments, the object for which they are drawn, and the effect of any alteration that may be made in one or the other. It is not necessary that there be any fraud nor even the desire to defraud, nor intention of personal gain on the part of the person committing it, that a falsification of a public document be punishable; it is sufficient that the one who committed it had the intention to prevent the truth and to falsify the document and that by it damage might result to a third party.

In public documents the Law takes into consideration not only private interests but also the interests of the community. The Law also takes into consideration the guaranty that the Government gives this class of documents, not only because, as has already been stated, they are written acts emanating from public authority, from public corporations or from public officials, but also because from the moment that those books have been entrusted to the care of a public official, the responsibility of the Government is not to a private individual, but to all the individuals who compose society, or social order; this is the fundamental reason of the difference between the falsification of a public document and the falsification of a private document.

In a few concise words, the Supreme Court of Spain in a sentence on the 3d of June, 1873, explained that difference thus: in an official or public document it is first endeavored to protect the interest of society by the most strict faithfulness on the part of the public official in the administration of the office entrusted to him; it being immaterial whether or not the falsification caused damage to a third party.

14 On the other hand, the Law in so far as it refers to private documents, is guided by different principles, because in these

documents the damage caused to a third party is the thing principally to be considered. The fact that a public official previous to his taking office gave the required bond will not exculpate such official if he falsifies a public document, for the bond has for its object only the guaranty of the acts of the official to the State, in so far as they relate to his financial responsibility, but the responsibility of the state to the community for official or public documents under the safeguard of the State, is in no way guaranteed by that bond. For this reason the criminal law punishes that crime, it being immaterial for that purpose whether the public official did or did not file the necessary bond.

In considering whether the accused should or should not be punished in accordance with the provisions of Sec. 300 of the Code as the direct author of the crime, it is, therefore, immaterial that he did deliver in any manner to the employees at the lighthouses at Capul and Malabriga in the month of September of the same year, 1904, after the falsification had been committed, the salaries due them and appearing in the aforesaid two false entries made in the cashbook of the said Bureau.

Neither is it necessary to go into a discussion of several facts, evidence for which was introduced by the prosecution, for the purpose of showing that the accused made the aforesaid false entries in the cashbook when he saw the impossibility of making said pay-

ments, since he had disposed of the salaries belonging to the employees of the light houses of Capul and Malabriga, and because he had no money at his disposal for that purpose until the month of

September when he forwarded them to *the* their respective
15 destinations. As to the rest, the manner in which the accused, Paul A. Weems, sent or endeavored to send to their destinations certain of the sums belonging to the employees in the lighthouses of Capul and Malabriga, placing bank bills in envelopes enclosing no letter or message of any kind and depositing the same in the letter-box of the Bureau of Coast Guard, so that said envelopes might get to the hands of said employees, is a circumstance which tends to show or confirm that the entries in the book under date of June 22nd, 1904, for the respective sums of 204 and 408 pesos, were made in order to have it explained in some way, and to make it appear, that the said payments were made on time.

There was plenty of evidence in the trial to make apparent the evil intention of the accused, Paul A. Weems, in all his actions, but it is not necessary to refer here to that evidence for the reason that the falsification is evident and to punish it, it is not necessary that there be the intention to damage a third party, nor that the damage has been caused.

We must make mention, however, of a particular circumstance which makes it necessary for paymasters or disbursing officers of the several Bureaus of the Government of the United States in these Islands, to be absolutely faithful in the performance of their duties, and that is, that the vouchers are required to be signed by public officials or employees of the Government receiving salary,—as was shown at the trial,—some days prior to the time they receive compensation for their work; and if one of these official paymasters or disbursing officers committed any falsification in his cashbooks or in other documents in which the exact date of payment should be entered by him, it might easily happen that an employee
16 would never be paid his salary, because of those entries and

the employee's signature on the payroll. From this results the necessity that disbursing officers be absolutely faithful in the performance of their duties and in the making of entries in the books entrusted to them on account of their position. Cases of defraudation of the public moneys and of falsifications of public and official documents are being frequently committed by Government Officials, and for its due suppression it is necessary that the law be strictly applied.

No circumstance modifying the responsibility is to be taken in consideration in the commission of the crime at bar, for which reason the penalty corresponding to the medium degree should be applied to the accused.

Therefore, I sentence the accused, Paul A. Weems, to the penalty of fifteen years of Cadena, together with the accessories of Sec. 56 of the Penal Code, and to pay a fine of four thousand pesetas, but not to suffer imprisonment as a subsidiary punishment in case of his

insolvency, on account of the nature of the main penalty, and to pay the costs of this cause.

It is so ordered.

Manila, March 31, 1905.

(Sgd.)

MANUEL ARAULLO, *Judge.*

17 THE UNITED STATES OF AMERICA,
Islands Filipinas:

In the Court of First Instance of the City of Manila.

Criminal, 1913.

THE UNITED STATES, Plaintiff,

versus

PAUL A. WEEMS, Defendant.

Appeal.

Comes now the defendant and feeling aggrieved at the sentence rendered in this cause, appeals from the same to the Supreme Court of these Islands.

Manila, April 13, 1905.

(Sgd.)

W. A. KINKAID,

Attorney for Accused.

Received copy, April 13, 1905.

(Sgd.) JESSE GEORGE,

Prosecuting Attorney.

18 THE UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

For Falsification of a Public Document by a Public Official.

THE UNITED STATES, Plaintiff and Ap-el-ee,

versus

PAUL A. WEEMS, Defendant and Appellant.

December 29, 1906. Registro General, 2825. Decisions Book 10, F. —.

Heard January 19, 1906. Before the Honorable President and Justices Torres, Mapa, Johnson, Carson, Willard, and Tracey.

Decision.

The appellant was charged in the Court of First Instance of Manila with the crime of falsification of a public document by a public official.

The evidence of record discloses that on or about the 22d day of June, 1904, the accused, Paul A. Weems, a duly appointed, qualified, and acting disbursing officer of the Bureau of Coast Guard and Transportation, falsified the cash book of the said Bureau by perverting the truth in the narration of the facts contained therein so as to make it appear that he, as said disbursing officer, had on the 22d day of June, 1904, paid out and disbursed, on account of the Capul light-house pay roll, voucher No. 29 for the month of May, 1904, as wages of employees in the light-house service at the said Capul light-house, the sum of P204, Philippine currency; and on account of the Malabriga light-house pay roll, voucher No. 30 for the month of May, 1904, as wages of the employees in the light-house service at the said Malabriga light-house, the sum of P408, Philippine currency, when, in truth and in fact, the said Paul A. Weems had not, as said disbursing officer nor in any other capacity, paid out or disbursed on the said 22d day of June, 1904, or on any 19 other date prior thereto, the sum of P204, Philippine currency, on voucher No. 29, nor P408, Philippine currency, on voucher No. 30, nor any part thereof except that he had paid out the sum of P204, Philippine currency, on account of voucher No. 30.

The accused admitted that he had made the said entries in the cash book showing payment in full of the pay rolls of Capul and Malabriga for the months of April and May, 1904, and that upon the said date the said employees had not received in cash the entire amounts set out in the said pay rolls but, in explanation of his conduct, he alleged that on or about the 22d day of June, 1904, he visited the light-house stations at Capul and Malabriga for the purpose of paying the wages of the light-house employees stationed there; that upon his arrival he discovered that through some mistake in his estimate he had failed to bring with him sufficient funds to make payments in full; that he had explained conditions to the employees at those light-houses; that the said light-house employees agreed to take a part of their salaries as set out in the pay rolls of April and May and requested the accused to hold the balance as a personal deposit to be paid to them when they should arrive in Manila or upon the following pay trip; that he regarded himself as personally responsible to the various employees for the amounts which had not been paid in cash and that he interpreted his agreement with these employees as in effect a payment of the amounts due upon the pay roll; and that employees were satisfied with this arrangement and so expressed themselves to him.

The chief light-house keepers at Capul and Malabriga were put upon the stand and wholly denied any knowledge of such an 20 agreement or that they, or any of their employees, had entered into such an agreement, and we are satisfied from their testimony that when the accused informed them that he had not brought enough money with him with which to pay their wages in full they accepted the amount actually paid because there was nothing else for them to do, but without surrendering their claim upon the government for the balance due them upon the pay rolls.

In the light of this testimony no credence can be given the highly improbable story of the accused, and it is necessary, therefore, to consider either the weight or pertinence of the evidence introduced by the prosecution to prove that the accused, shortly after his return from this pay trip, sent a number of cablegrams to friends in the United States begging the remittance of \$1,000 "to save him from imprisonment and disgrace," nor to take into consideration the evidence which tended to prove that, after criminal proceedings were instituted against him, the accused attempted to make surreptitious payments of the unpaid balance due on the said pay rolls for the month of May, 1904.

Counsel for the appellant relies especially upon the following alleged errors:

First. That the trial court erred in overruling the demurrer to the complaint, said demurrer being based on the ground that the accused is charged therein with having committed the offence as a public official, to wit, as disbursing officer of the Bureau of Coast Guard and Transportation of the United States Government in the Philippine Islands, and on the further ground that he is charged with falsifying a cashbook of the Bureau of Coast Guard and Transportation of the United States Government in the Philippine Islands, when, as it is alleged, an examination of existing laws discloses that no such Bureau has ever been created, the only Bureau of Coast

Guard and Transportation in the Philippine Islands being
21 the Bureau of Coast Gueard and Transportation of the Philippine Government.

Second. That the trial court erred in finding that the accused was a public official in the sense in which those words are used in Article 300 of the Penal Code, which defines and penalizes the crime with which the accused was charged.

Third. That the trial court erred in finding that the cashbook in which the alleged entries were made was a public document, in the sense in which those words are used in said article.

(1) Section 10 of General Orders No. 58, is as follows:

"No information or complaint is insufficient, nor can the trial, judgment, or other proceedings be affected by reason of a defect in matter of form which does not tend to prejudice a substantial right of the defendant upon the merits."

It is sufficient answer therefore to the first assignment of error to point out that the Bureau of Coast Guard and Transportation of the Philippine Government is sufficiently described as the Bureau of Coast Guard and Transportation of the Government of the United States in the Philippine Islands, because the Philippine Government is, in fact, the Government of the United States in the Philippine Islands. The alleged defect in the complaint could not "prejudice any substantial right of the defendant upon the merits," as the language used left no room for doubt as to the Bureau which it was intended to designate.

(2) That the accused was a public official at the time when the offense was committed does not seem to admit of doubt. Article 401 of the Penal Code is as follows:

22 "For the purposes of this and of the preceding titles of this book, every person shall be considered a public official who, by the immediate provisions of law or by popular election or appointment by competent Authority, takes part in the exercise of public functions."

And while no evidence was offered by the prosecution to prove that the accused had been appointed by competent authority to the office of disbursing officer of the Bureau of Coast Guard and Transportation, nevertheless under the provisions of sub-section 13 of section 334 of the Code of Civil Procedure such appointment may be presumed because the accused admits that at the time when the offense was committed he was in the exercise of the duties of that office.

That the book in which the falsification were proven to have been made was not a mere personal notebook or memorandum wherein the accused, for his personal convenience, kept a record of certain transactions, as is alleged by counsel for appellant, and that it was in fact the official cashbook of the disbursing officer of the Bureau of Coast Guard and Transportation was conclusively established by the testimony of W. B. Hatfield, disbursing officer of the Bureau of Coast Guard and Transportation, and A. M. Easthagen, official examiner in the auditor's department; these witnesses testified that "in the performance of his duty as disbursing officer of the Bureau of Coast Guard and Transportation the principal book kept by the accused was the official cashbook of the Bureau which had been opened when that book was known as the cashbook of the captain of the port and continued in use when the office of captain of the port was consolidated with and brought under the Bureau of Coast Guard and Transportation."

Section 1 of Act No. 36 of the Philippine Commission provides that—

23 "The accounts of all collecting, disbursing and accounting officers or agents authorized to receive or disburse money or to audit accounts in these islands shall be kept, and their reports shall be rendered, in accordance with the requirements of the act passed October 3, 1900 (No. 12), prescribing the method to be adopted by the Insular Treasurer in keeping and rendering accounts of his receipt and disbursements, and the liability of such officers or agents shall be determined in the same manner as the liability of the Insular Treasurer under said act."

And section 2 of said Act No. 12, passed October 3, 1900, is as follows:

"For the purpose of all reports required by law, the Insular Treasurer shall prepare, on the books of the Treasury, tabulated statements, showing the several sources from which revenue has been received and the several purposes for which the same has been disbursed, with three columns of figures, the first column showing the amounts of Insular money actually received or disbursed, the second column showing the amounts of United States money so received or disbursed, and the third column showing the aggregate amounts so received or disbursed stated in the money of the United States,

which last-named amount shall be ascertained as provided in the next section."

We are of opinion from the evidence of record that the cashbook described in the complaint was the record which the disbursing officer of the Bureau of Coast Guard and Transportation was required to keep under the express provisions of the above-cited laws.

Counsel for the appellant urges that Act No. 90 abrogated these laws in that it provided that—

"The Auditor shall, with the approval of the Military Governor, prescribe the forms for keeping and rendering all accounts subject to his examination and settlement, which form shall conform substantially with those used by officers rendering accounts to the Treasury Department of the United States, and issue all necessary instructions to the officers and agents rendering such accounts."

It will be observed, however, that this rule simply authorizes the Auditor to prescribe the form for keeping and rendering the accounts and until such forms have been prescribed it in no wise affects the provisions of any law in force prior thereto; there is nothing in the record to show that the Auditor has undertaken to do away with the keeping of records by disbursing

24 officers as prescribed in Act No. 36, and it would seem that his authority was limited to prescribing the form and manner in which such records should be kept and that he had no authority to authorize a failure to keep such records.

Article 299 of the Code of Civil Procedure defines a public writing as—

"The written acts or record of the acts of the sovereign authority, or officials bodies and tribunals and of public officers, legislative, judicial, and executive, of the Philippine Islands, or of the United States or of any State of the United States, or of a foreign country, and public records kept in the Philippine Islands of private writings."

Under this definition there can be no question that the cashbook falsified by the defendant was a public document as required by the provisions of Article 300 of the Penal Code.

The guilt of the accused was established beyond a reasonable doubt and we find no error in the proceedings prejudicial to the rights of the accused. The judgment and sentence appealed from should be, and is hereby, affirmed, with the costs of this instance against the appellant. After the expiration of ten days let judgment be entered in accordance herewith and ten days thereafter the record remanded to the court below for proper action. So ordered.

(Sgd.)

A. C. CARSON.

Concurring:

(All signed) C. S. Arellano, Florentino Torres, Victorino Mapa, E. Finley Johnson, Chas. A. Willard, James F. Tracey.

25

United States Supreme Court.

PAUL A. WEEMS, Plaintiff in Error,
versus
 THE UNITED STATES, Defendant in Error,

Stipulation of Counsel.

In the above entitled cause, in view of the fact that the Court will not revise the findings of fact on writ of error, it is agreed that the evidence may be omitted from the transcript.

GREGORIO ARANETA,
Attorney General of the Philippine Islands.
 W. A. KINCAID,
Attorney for Plaintiff in Error.

26 Annexed to his brief in the Supreme Court the appellant presented the following assignment of errors, to wit:

I.

The Court erred in overruling the demurrer presented against the complaint.

II.

The Court erred in holding that the cash book in question was a public document.

III.

The Court erred in holding that the accused made false entries in said cash book.

IV.

The Court erred in holding that the accused was a public official within the meaning of the law governing the falsification of public documents.

V.

There is a complete variance between the manner in which the crime has been committed as alleged in the complaint and as it has been proved.

VI.

There is a complete variance between the complaint and the evidence as to the official status of the accused.

UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court.

THE UNITED STATES, Plaintiff and Appellee,
versus
 PAUL A. WEEMS, Defendant and Appellant.

Comes now the defendant and appellant and excepts to the decision rendered by this Court on the 29th day of December, 1906.

Wherefore, he prays the Court to allow this exception as one in form and time filed.

Manila, January 3, 1907.

(Sgd.)

W. A. KINCAID,
Attorney for Defendant-Appellant.

Supreme Court of the Philippines, Clerk's Office.

Filed Jan. 4, 1907, 9:15 a/m/

(Sgd.) R. H.

28

JANUARY 7, 1907.

Mr. — — —.

SIR: This Supreme Court in its session of the 5th instant adopted the following resolution:

"The petition presented by Attorney Kincaid excepting to the decision of this Court rendered on the 29th of December, 1906, in cause No. 2825 against Paul A. Weems for the falsification of a public document having been submitted, the Court resolved to allow said exception as of time and form filed, and orders that it be attached to the record for proper effect."

Which I transmit to you for your information.

(Sgd.)

J. E. BLANCO,
Clerk Supreme Court, P. I.

A copy:

FISCAL AND KINCAID.

Mva.

29

R. G. No. 2825.

THE UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

THE UNITED STATES, Plaintiff and Appellee,
versus
 PAUL A. WEEMS, Defendant and Appellant.

Comes now the defendant and appellant and prays the Court to reconsider its decision rendered in this cause on the 29th of December, 1906, according him a new trial for the following reasons:

I.

The Court erred in holding that the defect in the complaint alleged by the accused was of description and form, whereas said defect is of substance, and in refusing to so hold, the Court violated the clause in Sec. 5 of the Act of Congress of the United States of July 1, 1902, which says,—

“That in all criminal prosecutions the accused shall enjoy the right to * * * demand the nature and cause of the accusation against him.”

II.

The Court erred in overruling the demurrer of the accused presented against the complaint, violating the same clause of the same Act of Congress.

III.

The Court erred in holding that there did not exist a substantial variance between the allegations of the complaint and the evidence introduced in support of it, again violating the clause of the Act of Congress above mentioned.

30

IV.

The Court erred in holding that “the cashbook” kept by the accused was a public or official document within the meaning of the law as amended, in connection with Sec. 300 of the Penal Code.

V.

The Court erred in holding that the accused was a public official within the meaning of Sec. 300 of the Penal Code and other recent acts bearing on the matter.

VI.

The Court erred in holding that the evidence establishes the guilt of the accused beyond a reasonable ground.

Manila, January 12, 1907.

(Sgd.)

W. A. KINCAID,
Attorney for Defendant and Appellant.

Supreme Court of the Philippines, Clerk's Office.

Filed Jan. 12, 1907, 11:56 a. m.

(Sgd.) R. H.

31

JANUARY 16, 1907.

Mr. _____.

SIR: This Supreme Court in its session of the 15th instant adopted the following resolution:

“Being informed of the petition presented by Attorney Kincaid, asking for the reconsideration of the decision of this Court rendered on the 29th day of December, 1906, in the case No. 2825 against Paul A. Weems for the falsification of a public document, the Court

resolved: The petition for the reconsideration is denied, and let it remain as decided."

Which I transmit to you for your information.

(Sgd.)

J. E. BLANCO,
Clerk Supreme Court, P. I.

A Copy:

FISCAL AND KINCAID.

32 THE UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands,

THE UNITED STATES, Plaintiff and Appellee,

versus

PAUL A. WEEMS, Defendant and Appellant.

Comes now the defendant and appellant and excepts to the final judgment rendered in this cause on the 16th instant.

Wherefore, he prays the Court to allow this exception as of time and form filed.

Manila, January 16, 1907.

(Sgd.)

W. A. KINCAID,
Attorney for Defendant-Appellant.

Supreme Court of the Philippines, Clerk's Office.

Filed Jan. 16, 1907, 9:40 a. m.

(Sgd.) R. H.

33

JANUARY 18, 1907.

Mr. ____.

SIR: This Court in its session of the 17th instant, adopted the following resolution:

"Being informed of the petition presented by Attorney Kincaid, in which an exception is taken to the final judgment rendered in cause No. 2825 against Paul A. Weems for the falsification of a public document, and a prayer is made to allow the same as of time and form filed, the Court allowed said petition and ordered the same to be attached to the record for its proper effect."

Which I transmit to you for your information.

(Sgd.)

J. E. BLANCO,
Clerk Supreme Court, P. I.

A Copy:

FISCAL AND KINCAID.

Mva.

34 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

THE UNITED STATES, Plaintiff and Appellee,

versus

PAUL A. WEEMS, Defendant and Appellant.

Comes Paul A. Weems defendant and appellant in the above entitled cause and represents:

I.

That final judgment has been rendered in said cause by which the judgment of the Court of First Instance convicting the petitioner Paul A. Weems for the offense of falsification of public document has been affirmed, in violation of the Philippine Bill as appears from the accompanying assignment of errors.

II.

Wherefore petitioner prays that he be granted a Writ of Error from the Supreme Court of the United States to the Supreme Court of the Philippine Islands with a supersedeas of the judgment and that upon the execution and approval of a bond in such sum as may be deemed sufficient, conditioned as required by law, he be admitted to bail pending such Writ of Error, in order that the judgement may be revised by the Supreme Court of the United States upon the assignment of errors presented with this petition.

35 He also prays that the record of the cause be ordered translated from Spanish to English in conformity with the rule prescribed by the Supreme Court of the United States.

(Sgd.)

W. A. KINKAID,

Attorney for Petitioner.

Supreme Court of the Philippines, Clerk's Office.

Filed Jan. 24, 1907.

36 In the Supreme Court of the United States.

In the Matter of the Petition of PAUL A. WEEMS, Plaintiff in Error,

versus

THE UNITED STATES, Defendant in Error.

Assignment of Errors.

Comes Paul A. Weems and says that in the record and proceedings in the above entitled cause there is manifest error in this, to wit:

I.

The Court erred in holding that the defect alleged by the accused in the complaint was of description and form; whereas said defect is of substance and in refusing to so hold, the Court violated

the clause of Sec. 5 of the Act of Congress of the United States of July 1, 1902, which says,—

“That in all criminal prosecutions the accused shall enjoy the right to demand the nature and cause of the accusation against him.”

II.

The Court erred in overruling the demurrer of the accused presented against the complaint, violating the same clause of the same Act of Congress.

37

III.

The Court erred in holding that there did not exist a variance between the allegations of the complaint and the evidence introduced in support of it, again violating the clause of the Act of Congress above mentioned.

IV.

The Court erred in holding that the “cashbook” kept by the accused was a public or official document within the meaning of the law as amended, in connection with Sec. 300 of the Penal Code.

V.

The Court erred in holding that the accused was a public officer within the meaning of Sec. 300 of the Penal Code and other recent acts of the Philippine Commission.

VI.

The Court erred in holding that the evidence establishes the guilt of the accused beyond a reasonable doubt.

Wherefore, said Paul A. Weems prays that the judgment of the Supreme Court of the Philippine Islands be reversed and the cause remanded to that Court with instructions to dismiss the prsecution against him.

(Sgd.)

W. A. KINKAID,
Attorney for Plaintiff in Error.

Supreme Court of the Philippines, Clerk's Office.
Filed Jan. 24, 1907.

38 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Judges of the Supreme Court of the Philippine Islands, Greeting:

Because the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Philippine Islands, before you, or some of you, between the United States, plaintiff and appellee and Paul A. Weems, defendant and appellant, a manifest error hath happened to the great damage of the said Paul A. Weems, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, we command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that

you have the same at Washington, on the 24th day of May, 39 1907, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States the 24th day of January in the year of Our Lord, 1907.

J. E. BLANCO,
*Clerk of the Supreme Court
of the Philippine Islands.*

The foregoing writ of error is allowed and it shall operate as a supersedeas of the judgment complained of, and upon the execution of a bond by Paul A. Weems in the sum of seven thousand five hundred pesos payable to the defendant in error, conditioned as required by law to be approved by me, he shall be entitled to his liberty pending such writ of error.

A. C. CARSON,
*Associate Justice of the Supreme Court
of the Philippine Islands.*

40 THE UNITED STATES OF AMERICA, *ss.*

To Attorney General for the Philippine Islands:

You are hereby cited and admonished to be in and appear at the Supreme Court of the United States, to be holden at Washington, within one hundred and twenty days from the date of this citation, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of the Philippine Islands, wherein Paul A. Weems is plaintiff in error, and the United States, defendant in error, to show cause if any there by, why the judgment in said Writ of Error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twenty-fifth day of January, in the year of Our Lord, 1907.

A. C. CARSON,
*Associate Justice of the Supreme Court
of the Philippine Islands.*

I admit the receipt of a copy of the above citation and accept service thereof as though regularly had this 28 day of January, 1907.

GREGORIO ARANETA,
Attorney General for the Philippine Islands.

41 THE UNITED STATES OF AMERICA,
*Philippine Islands:*THE UNITED STATES, Plaintiff and Appellee,
versus

PAUL A. WEEMS, Defendant and Appellant.

Bail Bond.

Whereas, Paul A. Weems, the defendant and appellant in the above entitled cause, has been convicted in the Supreme Court of the Philippine Islands for the crime of falsification of a public document, and a Writ of Error having been granted from the Supreme Court of the United States to the Supreme Court of the Philippine Islands for the purpose of reversing said sentence, and

Whereas, an order was issued by the Honorable A. C. Carson, Associate Justice of the Supreme Court of the Philippine Islands, after said Writ of Error had been allowed, granting the said Paul A. Weems provisional liberty while said Writ of Error is pending provided he give bail for the sum of seven thousand five hundred pesos (P7500.00);

Therefore, we, Paul A. Weems, as principal, and W. A. Kincaid and Marcelino de Santos, as sureties, by these presents bind ourselves jointly and severally that the aforesaid Paul A. Weems will pay the fine which the Supreme Court of the United States might order, and that he will give himself up to serve the sentence that the said Court may render, or that he will, in case the cause is returned for new trial, appear before the Court to which it is returned and submit to the orders and proceedings in the same, or that if he should fail to fulfill any of these conditions he will pay the

42 United States the sum of seven thousand five hundred pesos (P7500.00).

And to have it known we affix our signatures in Manila the 17th day of April, 1907.

(Sgd.)

PAUL A. WEEMS.

W. A. KINCAID.

MARCELINO DE SANTOS.

PHILIPPINE ISLANDS,
City of Manila:

Before me the undersigned authority on this day personally appeared W. A. Kincaid and Marcelino de Santos who, after being duly sworn, deposed: that they were the persons who subscribed the foregoing bond; that they are solvent and possessors of real property in the Philippine Islands, and that each one of them possesses property actually worth the amount specified in said undertaking, over all their debts and obligations and exempt from execution.

W. A. KINCAID.

Certificate of Registration No. A157286, issued in Manila, Jan. 10, 1907.

MARCELINO DE SANTOS.

Certificate of Registration No. A1498484, issued in Manila, March 5, 1907.

Sworn to and subscribed before me this 17th day of April, 1907

(Sgd.)

ROBERTO MORENO,
Notary Public.

My appointment terminates on the 31st of December, 1908.

Approved:

A. FINLEY JOHNSON,
Associate Justice, Supreme Court.

43

No. 2825.

THE UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

I, J. E. Blanco, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that in a certain cause pending in said Court, wherein Paul A. Weems was appellant, and The United States was appellee, a final judgment was rendered by said Supreme Court on the sixteenth day of January, A. D. 1907, in favor of the said The United States, and against the said Paul A. Weems, and that on the twenty-fourth day of January, A. D. 1907, the said Paul A. Weems sued out a writ of error to said Supreme Court, directed to remove said cause to the Supreme Court of the United States.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at Manila, P. I., this twentieth day of April, A. D. 1907.

[Seal Corte Suprema, Islas Filipinas.]

(Sgd.)

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

[SEAL OF COURT.]

44 PHILIPPINE ISLANDS,

City of Manila, ss:

I, R. Heras, Acting Clerk of the Supreme Court of the Philippine Islands, do hereby certify that the foregoing 43 typewritten pages contain a true and correct copy of so much of the record and proceedings in the case of Paul A. Weems, plaintiff in error *vs.* The United States, defendant in error, as the parties have, by written stipulation, agreed to forward to the Supreme Court of the United States at Washington, D. C.

In witness whereof, I have hereunto set my hand and affixed the

seal of the Supreme Court of the Philippine Islands this 26th day of June, A. D. 1907.

[Seal Corte Suprema, Islas Filipinas.]

R. HERAS,
*Acting Clerk of the Supreme Court
of the Philippine Islands.*

Endorsed on cover: File No. 20,885. Philippine Islands, supreme court. Term No. 193. Paul A. Weems, plaintiff in error, *vs.* The United States. Filed October 14th, 1907. File No. 20,885.

WRETT OF CERTIORARI AND

SUPREME COURT OF THE UNITED STATES

October Term, 1898

No. 90.

PAUL A. WHITEMAN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES,

PLAINTIFF IN ERROR.

(20885)

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1909.

No. 20.

PAUL A. WEEMS, PLAINTIFF IN ERROR,

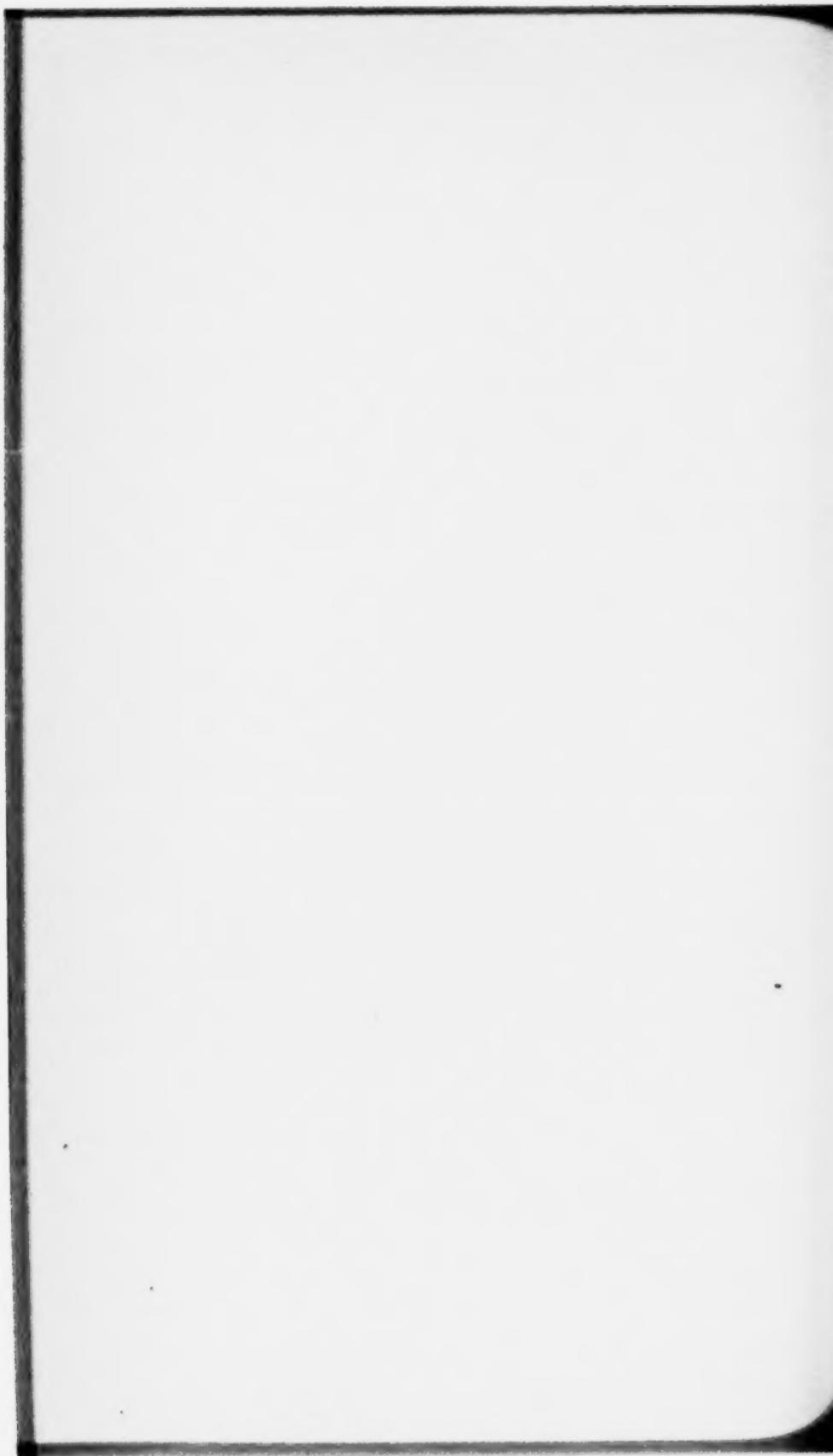
vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

INDEX.

	Original.	Print.
Return to writ of certiorari.....	1	1
Testimony of A. M. Easthagen	2	1
W. Hatfield.....	4	2
Frederick Simcock.....	7	5
Ora Miller.....	9	6
Sheriff's statement of arrest and delivery of Weems to proper court	11	7
Clerk's certificate as to bond.....	11	7
Motion to overrule demurrer.....	12	7
Arraignment.....	16	9
Subpoena	17	10
Præcipe for subpœna duces tecum.....	18	10
Subpoena duces tecum	19	11
Subpoena	21	11
Subpoena	22	12
Subpœna	23	12
Motion as to deposit of money.....	24	12
Stipulation as to deposit of money.....	26	13
Order to deposit money.....	27	14
Clerk's certificate	27	14
Writ of certiorari.....	28	15



1 The United States of America, Philippine Islands, in the Supreme Court of said islands.

THE UNITED STATES, PLAINTIFF AND APPELLEE,
vs.

PAUL A. WEEMS, DEFENDANT AND APPELLANT. }

I, J. E. Blanco, clerk of the Supreme Court of the Philippine Islands, do hereby certify that, in compliance with the certiorari issued from the office of the clerk of the Supreme Court of the United States, which is hereto annexed, I have carefully searched the record of Cause No. 2825, The United States, plaintiff, versus Paul A. Weems, defendant, in this Supreme Court of the Philippine Islands, and that the following is a true and correct transcript of all that appears of record in said cause except such parts thereof as were included in the return to the writ of error issued therein, omitting only the evidence taken upon the trial of said cause:

2 *Preliminary investigations. Held before the Honorable Manuel Araullo, Judge of Part I of the Court of First Instance for the City of Manila, P. I., by the Assistant Municipal Prosecuting Attorney, Mr. Jesse George.*

Testimony of Mr. A. M. Easthagen.

After being duly sworn, witness testified as follows:

By Mr. GEORGE:

What is your name?

W. A. M. Easthagen.

A. Your residence?

W. 170 Real street, Ermita.

A. Your occupation?

W. Examiner in the office of the auditor.

A. Please state whether or not you have examined during the last three or five months the accounts presented by the disbursing officer of the Bureau of Coast Guard and Transportation.

W. Yes, sir.

A. When did you examine those papers?

W. I made two examinations on July 15 and August 5, approximately, this year.

A. I show you this book; tell what it is.

W. It is the official cash-book of the office of the disbursing officer of the Bureau of Coast Guard and Transportation.

A. Please also state whether that book also contains the report of the payments made by the captain of the port, whose office was abolished on February.

W. Yes, sir.

A. In that examination that you made, did you use this book?

W. Yes, sir.

3 A. Please open that book on page 190, and I call your attention to vouchers 29 and 30, and the entries made therein, underlined from the last upward, the first being ruled with blue lines from the last of the lines, and I wish you would state whether that entry was there when you made the examinations you have mentioned.

W. Yes, sir; it was.

A. Who was the disbursing officer at the time you made that examination?

W. Mr. Paul A. Weems.

A. Do you know whether Mr. Weems was the disbursing officer during the months of May and June of this year?

W. Yes, sir.

A. State whether or not you have given credit to Weems for the entries found in this book.

W. Yes, sir.

A. Why did you give him credit for those payments?

W. I have given him credit because he presented vouchers duly prepared and which are in his office.

A. Now I show you vouchers Nos. 29 and 30, which are supposed to be the vouchers presented by Paul A. Weems. Are those the vouchers to which you have referred?

W. Yes, sir.

A. Please state whether or not it appears from those vouchers that they have been paid.

W. Yes, sir.

A. Was Mr. Weems present when you made either of those examinations?

W. Yes, sir.

A. Was he present at both examinations?

W. No, sir.

A. In which examination was he present?

W. In the examination made in July.

4 A. In the examination made in July, did Mr. Weems tell you that these two vouchers had not been paid?

T. After the return of Mr. Miller, a representative of this office, from an inspection trip in these places mentioned in the document.

A. Was this before or after that examination had been made?

W. After.

(Signed) A. M. EASTHAGEN.

Testimony of W. Hatfield.

After being duly sworn, witness testified as follows:

A. Please state your name, residence, and profession.

W. W. Hatfield. 151 Malacañang. Disbursing officer of the Bureau of Coast Guard and Transportation.

A. Whose place did you take as disbursing officer of the Bureau of Transportation?

W. I did not take anybody's place; it was a position newly created.

A. Do you know who was the disbursing officer during the months of April, May, June, and July of this year?

W. The disbursing officer, Paul A. Weems.

A. Did you ever have any occasion to know the handwriting of Mr. Paul A. Weems?

W. Yes, sir.

A. I call your attention to the 2nd and 1st entries underlined with blue lines, Nos. 29 and 30 of this cash-book, and please state whether or not you recognize the handwriting.

W. I would say it is Mr. Weems'.

A. What is this book to which I have now referred, and which is before you?

W. The official cash-book of the Bureau of Transportation.

A. Which was also being used before in the office of the 5 captain of the port until that office was abolished?

W. Yes, sir.

A. In whose possession was this cash-book on the 22nd of June last?

W. Mr. Weems'.

A. Please examine those two vouchers, Nos. 29 and 30, and state what they are. What I mean is, what payments do they represent?

W. They represent payments in Capul and Punta Malabriga.

A. When did you take possession of your office as disbursing officer of the Bureau of Coast Guard?

W. On August 6, 1904.

A. When you took possession of your office, had this voucher been actually paid or no?

W. It had not been paid in full.

A. When did you discover for the first time that it had not been paid?

W. Toward the end of August or the beginning of September.

A. How did you happen to discover it?

W. The one corresponding to Capul, No. 29, was discovered on the return of my deputy disbursing officer from a trip, who informed me that the person named in this voucher had received the sums mentioned therein in a plain envelope, during the trip that I have mentioned, stating that there was a payment due to him in arrears.

A. And as regards the other, when did you discover it?

W. On September 12.

A. How did you happen to discover it?

W. Part of the money mentioned in voucher No. 30 was delivered to me by Commander Helm.

A. How did he deliver it to you?

W. In a separate envelope addressed to each one of the names contained here.

6 A. Where was that envelope found?

W. In a box in the lighthouse—in the mail box.

A. To whom was the envelope addressed?

W. To the guards and boatmen there.

A. Who had deposited that envelope there?

W. I do not know.

A. Have you ever had any conversation with Paul Weems about this?

W. I was present in the conversation that took place between Mr. Weems and Commander Helm on September 11; in the course of that conversation Mr. Weems stated that he had delivered these envelopes to Mr. Piatt.

A. Who is Mr. Piatt?

W. The clerk in the office in charge of the preservation and repairs of lighthouses.

A. Did he tell you why he had delivered those envelopes to Mr. Piatt?

W. He said that it was money belonging to the guards or watchmen of the lighthouses.

A. Was this more than one month after you had taken possession of that office?

W. Yes, sir.

A. Did you count the money contained in those envelopes to find out whether or not it corresponded to the sum mentioned in the vouchers?

W. Yes, sir.

A. Did said money correspond to that sum or not?

W. Yes, sir; it corresponded to the sum belonging to each one of those persons to whom the envelopes were addressed.

A. Was there any letter in that envelope remitting said money, and explaining the purposes for which it was remitted?

W. No, sir.

7 A. Was there any letter remitting that money in those envelopes pertaining to Capul which you had discovered?

W. Mr. Pierce said there was none.

A. Please state whether these are the envelopes discovered by Mr. Pierce.

W. Yes, sir.

A. Do the names that appear from those envelopes correspond to the envelopes corresponding to voucher No. 29, paid in Capul?

W. Yes.

A. Was that mark at the corner of the envelope put by you? And your initials?

W. Yes, sir, as a means of identification and to show the date.

A. Where did Pierce find this envelope?

W. In the cabin of the lighthouse boat.

A. While on his trip for the purpose of making payments?

W. Yes, sir.

(Signed)

H. B. HATFIELD, 11/29/04.

Testimony of Frederick Simcock.

After being duly sworn, witness testified as follows:

A. What is your name?

W. Frederick Simcock.

A. Where do you live?

W. 61 Trinidad street.

A. What is your occupation?

W. Chief clerk in the Bureau of Transportation.

A. Do you know Paul A. Weems?

W. Yes, sir.

A. Where did you know him?

W. In the office where we have worked together since the beginning of January, 1903.

A. Are you acquainted in any way with his handwriting?

8 W. Yes, sir.

A. Please look at the second entry in the official cash-book, and carefully look at the line below, two lines from the bottom, and examine the handwriting.

W. I believe this is Mr. Weems' handwriting.

A. Do you remember that some envelopes containing money were found in the Bureau of Coast Guard and Transportation during the first days of September of this year?

W. Yes, sir.

A. Do you remember whether you have been present at a conversation that took place between Mr. Helm and Mr. Weems regarding those envelopes?

W. Yes, sir.

A. Do you know what Mr. Weems said—if he said anything then—about those envelopes and their contents?

W. Mr. Weems told me that he had put some money in the envelopes addressed to several guards or watchmen in the lighthouses, and that he had left them with Mr. Piatt.

A. Do you know whether or not he had really left them with Mr. Piatt, or did he put them in a box in order that they might be dispatched by mail?

W. According to what he said, it does not clearly appear that he had delivered it to Mr. Piatt.

A. The first thing that was known when the envelopes were discovered was that they were found in a box; was it not?

W. Yes, sir.

A. In the ordinary course of business in the office, what was done with the letters in that mail box?

W. There are three boxes for the three lighthouse boats, one box for each boat. Whenever a boat is ready to start, the captain takes all the mails from the box corresponding to him on board. There

9 is a fourth box in which all the letters for the different lighthouses are placed; and the envelopes in question were found in this box.

(Signed)

FREDERICK SIMCOCK.

Testimony of Ora Miller.

After being duly sworn, witness testified as follows:

A. Please state your name, residence, and occupation.

W. Ora Miller; Isaac Peral street; employee in the office of the auditor.

A. Please state whether or not an investigation was made in the office of the auditor, as regards voucher No. 30 for the month of June, 1904, of Mr. Paul Weems, of the Bureau of Coast Guard.

W. Yes, sir; an investigation was made by me.

A. At the time you made the investigation, did you find that the men whose names appear here had been really paid or not?

W. What I found was that the persons whose names appear in this voucher had not been paid at the time the investigation was made.

A. Did you take down with your machine the sworn testimony of these men?

W. Yes, sir.

A. Please examine this sworn testimony.

W. This collection of letters are the testimony of each and every one of the employees that appear from the list.

The COURT. What number?

W. Voucher No. 30.

A. I would like to know only the names corresponding to them.

W. F. de León, E. Castilla, E. Duenas, E. Soriano, E. Alegre.

A. Was that sworn testimony taken before you as a notary public?

W. Yes, sir.

A. Did you have any seal at that time?

W. No, sir.

A. Do you have any seal now?

10 W. No, sir.

A. Did you make any investigation as regards vouchers No. 29?

W. Yes, sir.

A. What did you find there? Have those persons whose names appear there been paid or not?

W. I found that the employees whose names appear in vouchers No. 29 have received their salaries for the month of May, as it appears from the documents; that was during the last trip of the lighthouse boat.

A. From whom did they receive their salaries, and how did they receive them?

W. They received the money in a close and sealed envelope.

A. Did these envelopes contain any letters explaining the remittance?

W. The employees did not say anything whether there were any explanatory letters contained in the envelopes.

A. Was this money paid before or after Mr. Weems had ceased discharging the functions of disbursing officer?

W. After.

(Signed)

ORA MILLER.

Return upon the Order of Arrest.

United States of America, City of Manila.

I have this date arrested Paul A. Weems, and delivered him to the proper court.

Manila, November 29, 1904.

(Sgd)

JAMES J. PETERSON,
Sheriff, City of Manila.

Sheriff's fee ₱1.12.

I hereby certify that on this date the accused gave a bond in the amount of \$2,000.00 gold to the satisfaction of the court. Recorded at Book No. 2, p. 141.

Manila, December 1, 1904.

(Sgd) C. A. SOBRAL,

*Assistant Clerk, Court of First Instance,
Manila, P. I.*

Surties:

B. F. Rahmeyer, 150 Santa Potenciana,
Henry M. Jones, 381 Calle S. Marcelino.

12 United States of America, Philippine Islands, in the Court of First Instance for the City of Manila.

THE UNITED STATES, PLAINTIFF, } vs. No. 1913. Falsification of a Public
PAUL A. WEEMS, DEFENDANT. } Document by a Public Official.

Motion.

The undersigned prosecuting attorney moves the court to overrule the demurrer of the defendant filed herein for the following reasons:

Under the provisions of section 6 of general order 58 a complaint or information is sufficient if it shows

1st. The name of the defendant.

This complaint complies with that requisite, and the name of the defendant is alleged therein as "Paul A. Weems."

2nd. The complaint or information must give the designation of the crime or public offense charged.

This it does, both in the caption and in the first paragraph of the complaint, exactly as required by said general order 58. The offense is designated as "falsification of a public document by a public official." By reference to article 300, taken in connection with article 301, of the Penal Code, it will be seen that it provides for the falsification of a public document by a public official, which is a distinct crime from the falsification of a public document by a private individual, the punishment of which is provided for by article 301 of the code, and also a crime distinct from the falsification of a private document, punished by the provisions of article 304 of said code.

13 The complaint has, hence, clearly and specifically designated the crime provided for and punished by article 300 of the Penal Code, in exact accordance with the second requirement of section 6 of general order 58.

3rd. The third requirement of general order 58 is that the complaint must set out the acts or omissions complained of as constituting the crime or public offense in ordinary and concise language, without repetition, not necessarily in the words of the statute, but in such form as to enable a person of common understanding to know what is intended, and the court to pronounce judgment according to right.

This provision has been complied with, in that the complaint alleges, first, that Paul A. Weems was a public official of the United States Government of the Philippine Islands at the time the offense was alleged to have been committed, and the exact office that he held at the time is given: second, that on or about the 22nd day of June, 1904, the defendant falsified a public and official document, which document is named and specifically described in the complaint as the cash-book of the captain of the port of Manila, Philippine Islands, and the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands, kept by the said defendant as disbursing officer of the said Bureau of Coast Guard and Transportation as an official record and document of his said office, and of the office of the captain of the port and the Bureau of Coast Guard and Transportation of the Philippine Islands, for the purpose of recording and keeping accounts therein of the receipts and disbursements in said Bureau of Coast Guard and Transportation, made by the said Paul A. Weems as said disbursing officer. It would seem that the document could not be more definitely and clearly defined and described. Third, it is alleged that the defendant, taking advantage

14 of his said official position, corruptly and with the intent then and there to deceive and defraud the United States Govern-

ment of the Philippine Islands and its officials, falsify such document by perverting the truth in the narration of the facts contained in the said record or document, and by causing the document to appear and show on its face that the said defendant, as disbursing officer, had then and there paid out the sum of four hundred eight (408.00) pesos as wages at Malibriga lighthouse, and two hundred four (204.00) pesos as wages at Capul lighthouse, when in fact he had not paid out or disbursed such sums. In order to make the complaint more specific, every word, figure, and mark that is alleged to be falsified is set out and quoted at length in the complaint, with a particular description of the column, line, and page on which each mark was entered, and in such a way that no one of common understanding could fail to understand clearly that the said defendant had made a false entry in his cash-book and given himself credit for the payment of sums of money that he had never paid out.

4th. The fourth requirement of general order 58 is that the complaint must show that the offense was committed within the jurisdiction of the court and is triable therein.

The complaint alleges that the crime was committed in the city of Manila, Philippine Islands, and the crime charged is a grave one, of which this court, and not the municipal court, has jurisdiction.

5th. The fifth requirement of general order 58 is that the names of the persons against whom or against whose property the offense was committed, if known, must be set out in the complaint.

This has been done. It is specifically alleged that the crime was committed with the intent then and there to deceive and defraud the United States Government of the Philippine Islands and its officials.

15 The above is a complete answer, as the prosecution believes, to the first four grounds in the defendant's demurrer.

As to the fifth objection, viz, "No copy has been inserted in the complaint of the document falsified, nor copy of the same attached thereto," there is no provision or requirement in general order 58 that the document declared on shall be either set out in full in the complaint or a copy thereof attached to the complaint; nor is there such a requirement in civil proceedings in the Philippine Islands. In the present case it will be noted by reference to the complaint that the document alleged to be falsified is a cash-book; that the falsification was committed on page 190 of said cash-book; and it is perfectly manifest that to attach a copy of a cash-book of at least one hundred and ninety pages would be useless and a foolish encumbering of the record. An exact copy of that portion of the cash-book alleged to have been falsified is set forth in the complaint, and this is even more than general order 58 requires; for, as it is stated above, there is absolutely no requirement of law in the Philippine Islands requiring that a document declared on, either in a civil or criminal case, must be set out in the pleadings or a copy thereof attached.

Dated at Manila, P. I., this 5th day of December, 1904.

CHAS. H. SMITH,
Prosecuting Attorney.

Received copy of above this —— day of December, 1904.

JG-RS

16 United States of America, Philippine Islands, in the Court of First Instance for the City of Manila, Part ——.

THE UNITED STATES
vs.
PAUL A. WEEMS. } No. 1913. Arraignment.

Present, the assistant prosecuting attorney for the city of Manila, Mr. Abreu, and the defendant in this case, Paul A. Weems, who stated that he did not need the presence of his counsel, Mr. Kincaid, and after being informed of the contents of the information filed

against him in this court for the offense of falsification, and after serving on him a copy of said information, the said defendant plead not guilty of the offense as charged therein.

Manila, December 12, 1904.

(Sgd.)

C. A. SOBRAL,

Assistant Clerk.

17 United States of America, Manila, Philippine Islands, in the Court of First Instance of the Judicial District of Manila.

THE UNITED STATES
vs.
PAUL A. WEEMS. } No. 1913. Subpœna.

To W. W. Barre	of Acting auditor.
" A. M. Easthagen	" Examiner, auditor's office.
" Ora Miller	" "
" James L. Pierce	" Coast Guard & Trans. Dept.
" Mr. Piatt	" "
" Mr. Simecock	" "
" Capt. Franklin	" "
" Mr. Hatfield	" "
" Commander J. M. Helm	" "
" A. Zulueta	" c/o " Lipata lighthouse, Capul.
" M. Gregorio	" " Malabriga lighthouse.
" Engineer Thompson	" "

Greeting: You are hereby commanded to be and appear in the Court of First Instance of the judicial district of Manila, Part I, No. 47 Calle Palacio, Intramuros, at 8 o'clock on the 27th day of December, 1904, then and there to testify in the above-entitled cause pending therein.

Fail not, under the penalty of the law.

Witness the honorable judge of said court this 13th day of December, 1904.

(Sgd.)

C. A. SOBRAL,

Assistant Clerk.

18 United States of America, Philippine Islands, in the Court of First Instance for the City of Manila.

THE UNITED STATES, PLAINTIFF,
vs.
PAUL A. WEEMS, DEFENDANT. } No. —. Falsification.

Præcipe.

The clerk will please issue a subpoena duces tecum to Mr. E. Desnouie, superintendent Commercial Pacific Cable Co., Manila, P. I., to appear as a witness on behalf of the prosecution, at 8.00 a. m. on the 27th day of December, 1904, in the trial of the above-entitled

directed to Mary Avanzino, Reno, Nevada, signed Joe; July 1st, 1904, addressed to Dennis, Suttercreek, signed Capurro; June 29th, 1904, directed to Johnson, care John Cay, Atlanta, signed Paul; July 3rd, 1904, directed to Weems, Greenwood, Mississippi, signed Vanderpool; July 7th, 1904, directed to Weems, Greenwood, Mississippi, signed Vanderpool; and of July 9th, 1904, directed to Mary, Newman, signed Paul.

Respectfully,

CHAS. H. SMITH,
Prosecuting Attorney.

JG-RS-la-22-04.

19 United States of America, Philippine Islands, in the Court of First Instance for the City of Manila.

THE UNITED STATES
vs.
PAUL A. WEEMS. } No. 1913. Subpoena duces tecum.

To E. DESNOUE, *Superintendent, Commercial Pacific Cable Co., Manila, P. I.*

Greeting: You are hereby required to appear before the Court of First Instance for the City of Manila, Part I, No. 47 Calle Palacio, Intramuros, on the 27th day of December, 1904, at 8 o'clock in the forenoon, and to bring with you into court the following described documents: The original cablegrams of July 1, 1904, directed to Mary Avanzino, Reno, Nevada, signed Joe; July 1, 1904, addressed to Dennis, Suttercreek, signed Capurro; June 29, 1904, directed to Johnson, care John Cay, Atlanta, signed Paul; July 3, 1904, directed to Weems, Greenwood, Mississippi, signed Vanderpool; July 7, 1904, directed to Weems, Greenwood, Mississippi, signed Vanderpool; and of July 9, 1904, directed to Mary, Newman, signed Paul; it being necessary to use the same as testimony in a cause there pending,
20 wherein the United States is plaintiff and Paul A. Weems is defendant.

Hereof fail not, under penalty of the law.

Witness the honorable judge of said court this 22nd day of December, 1904.

(Sgd.) C. A. SOBRAL,
Assistant Clerk.

21 United States of America, Manila, Philippine Islands, in the Court of First Instance of the Judicial District of Manila.

THE UNITED STATES
vs.
PAUL A. WEEMS. } No. 1913. Subpoena.

To Capt. Dr. HEIZER, *of Quarantine Station, Manila, P. I.*

Greeting: You are hereby commanded to be and appear in the Court of First Instance of the judicial district of Manila, Part I, No.

47 Calle Palacio, Intramuros, immediately to testify in the above-entitled cause pending therein.

Fail not, under the penalty of the law.

Witness the honorable judge of said court this 27th day of December, 1904.

(Sgd.)

C. A. SOBRAL,
Assistant Clerk.

22 United States of America, Manila, Philippine Islands, in the Court of First Instance of the Judicial District of Manila.

THE UNITED STATES
vs.
PAUL A. WEEMS. } No. 1913. Subpœna.

To Dr. V. G. HEIZER, *of 53 P. McKinley W. C.*

Greeting: You are hereby commanded to be and appear in the Court of First Instance of the judicial district of Manila, Part I, No. 47 Calle Palacio, Intramuros, immediately to testify in the above-entitled cause pending therein.

Fail not, under the penalty of the law.

Witness the honorable judge of said court this 28th day of December, 1904.

(Sgd.)

C. A. SOBRAL,
Assistant Clerk.

23 United States of America, Manila, Philippine Islands, in the Court of First Instance of the Judicial District of Manila.

THE UNITED STATES
vs.
PAUL A. WEEMS. } No. 1913. Subpœna.

To Capt. FRANKLIN, *of Coast Guard and Transportation Dept.*

Greeting: You are hereby commanded to be and appear in the Court of First Instance of the judicial district of Manila, Part I, No. 47 Calle Palacio, Intramuros, immediately to testify in the above-entitled cause pending therein.

Fail not, under the penalty of the law.

Witness the honorable judge of said court this 28th day of December, 1904.

(Sgd.)

C. A. SOBRAL,
Assistant Clerk.

24 United States of America, Philippine Islands, in the Supreme Court of the Philippine Islands.

THE UNITED STATES, PLAINTIFF,
against
PAUL A. WEEMS, DEFENDANT. } Motion.

Comes now the plaintiff in the above-entitled cause, and says:

1. That the accused Paul A. Weems, formerly disbursing officer

of the Bureau of Coast Guard and Transportation, was tried and convicted by the Court of First Instance of Manila of the crime of falsification of a public document.

2. That an appeal was taken from said sentence of the Court of First Instance, and that said appeal is now pending before this honorable court.

3. That the prosecution introduced in evidence against the accused certain envelopes marked Exhibits 14, 15, 16, 17, 18, and 19, which contained various sums of money amounting in all to the sum of two hundred and four (P204) pesos, Philippine currency.

4. That said money having been duly counted and exhibited before the trial court (see pages 97 and 98 of the record), is no longer necessary as evidence against the accused.

25 5. That the said sum of money was and is still retained by the clerk of the Court of First Instance of Manila as a part of the evidence duly introduced against the accused.

6. That the proofs in this cause show that said sum of money was a part of the official funds of said Paul A. Weems and should be deposited to his credit.

7. That the auditor of the Philippine Islands desires to close up the accounts of the said Paul A. Weems, and is unable to do so until said money has been deposited to the credit of said Paul A. Weems.

Wherefore it is prayed that an order issue from this honorable court directing the clerk of the Court of First Instance of the city of Manila to deposit said sum of two hundred and four (P204) pesos, Philippine currency, with the insular treasurer to the credit of Paul A. Weems, as late disbursing officer of the Bureau of Coast Guard and Transportation.

(Sgd.) GREGORIO ARANETA,
Solicitor-General.

Copy received:

(Sgd.) W. A. KINCAID.

Filed in the clerk's office of the Supreme Court of the Philippine Islands this 6 day of September, 1905.

(Sgd.) J. E. BLANCO, *Clerk,*
By H. D. McGEORGE, *Deputy.*

26 United States of America, Philippine Islands, Supreme Court of the Philippine Islands.

THE UNITED STATES, PLAINTIFF, }
vs. } Stipulation.
PAUL A. WEEMS, DEFENDANT. }

It is hereby agreed between the plaintiff and defendant in the above-entitled cause that the sum of two hundred and four (204) pesos, Philippine currency, introduced as evidence by the plaintiff in the trial of said cause in the Court of First Instance for the city of

Manila, and which is actually in the possession of the clerk of said trial court, is part of the Government's funds which the said defendant, Paul A. Weems, had in his possession, as ex-disbursing officer of the Bureau of Coast Guard and Transportation; and it is further agreed that the said sum of two hundred and four (204) pesos, Philippine currency, be deposited by the clerk of said trial court in the treasury of the Philippine Islands to the credit of the said defendant, Paul A. Weems, as ex-disbursing officer of the Bureau of Coast Guard and Transportation, upon a formal order of the Supreme Court of the Philippine Islands.

(Sgd.)

L. R. WILFLEY,

Attorney-General.

(Sgd.)

W. A. KINCAID,

Attorney for defendant.

Filed in the clerk's office of the Supreme Court of the Philippine Islands this 15 day September, 1905.

J. E. BLANCO, *Clerk.*(Sgd.) By H. D. McGEORGE, *Deputy.*

27

SEPTEMBER 16, 1905.

SIR: In its session on the 15th inst., the Supreme Court ordered as follows:

"After due consideration of the agreement presented by the Attorney-General, on behalf of the Government, and Mr. W. A. Kincaid, on behalf of Paul A. Weems, accused in case No. 2825 of the crime of falsification of public document, in which agreement it is stipulated that the sum of two hundred and four (204) pesos, Philippine currency, introduced as evidence by the plaintiff in the trial court, and which is actually in the possession of the clerk of said trial court, shall be deposited in the treasury of the Philippine Islands to the credit of the accused Weems, as ex-disbursing officer of the Bureau of Coast Guard and Transportation, the court hereby orders the clerk of the Court of First Instance for the city of Manila to deposit the aforesaid sum of two hundred and four (204) pesos, Philippine currency, in the insular treasury to the credit of the accused, Paul A. Weems."

I herewith forward said order to you for your information and compliance.

Very respectfully,

(Signed) J. E. BLANCO,

Clerk of the Supreme Court of the Philippine Islands.

In witness whereof I have hereunto set my hand and affixed the seal of the Supreme Court of the Philippine Islands this 20th day of July, 1909.

[SEAL.]

J. E. BLANCO,

Clerk of the Supreme Court of the Philippine Islands.

28 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the Supreme Court of the Philippine Islands, greeting:

Whereas in a certain suit in said Supreme Court between Paul A. Weems, appellant, and The United States, appellee, which [SEAL.] suit was removed to the Supreme Court of the United States by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"All parts of the record in this cause which have been omitted from the record now on file, except the evidence."

You therefore are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of May, A. D. 1909.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

(Indorsement on cover:) File No., 20885. Supreme Court U. S. October term, 1909. Term No., 20. Paul A. Weems, plff in error, vs. The United States. Writ of certiorari and return. Filed Sept. 11th, 1909.

O

8527-09—2



Office Supreme Court, S. C.
FILLED.

APR 27 1908

JAMES H. MCKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. ~~100~~ 26.

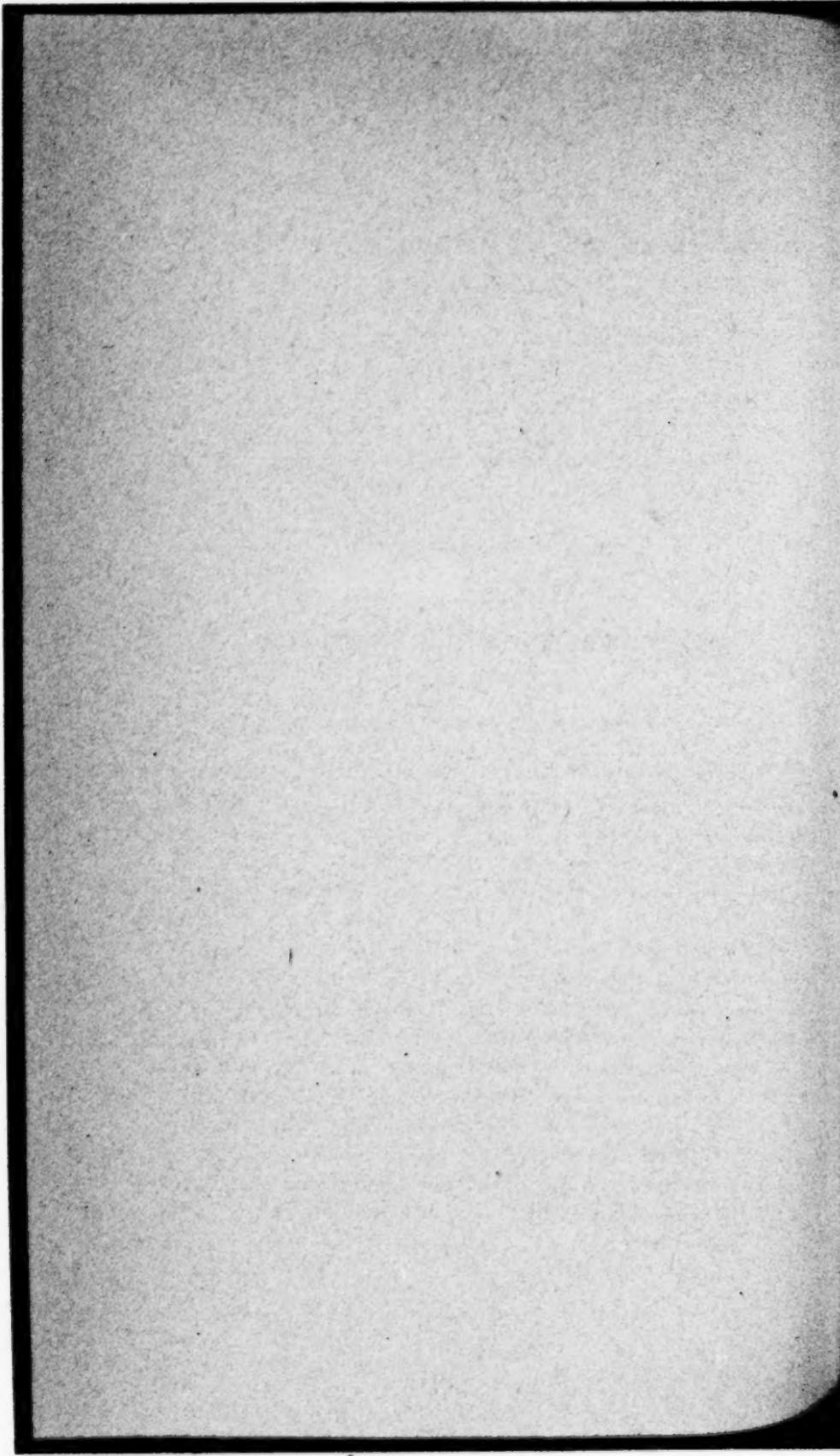
PAUL A. WEEMS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

BRIEF FOR PLAINTIFF IN ERROR.

**A. S. WORTHINGTON,
Attorney for Plaintiff in Error.**



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 193.

PAUL A. WEEMS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The plaintiff in error was convicted in the court of first instance for the city of Manila, in the Philippine Islands, of falsifying "a public and official document." On appeal the conviction was affirmed by the Supreme Court of the Philippine Islands. A writ of error was thereupon sued out from this court.

The record sent up to this court does not contain any of the evidence at the trial, nor does it contain any bill of exceptions. The questions involved, therefore, are those which arise on the face of the record of the proceedings in the case.

In the information—or "complaint"—by which the prosecution was begun, it was charged that Weems was "a duly appointed, qualified, and acting disbursing officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands," and that he took advantage of his official position to deceive and defraud

"the United States Government of the Philippine Islands and its officials" by falsifying a certain cash-book, which was an official record, by entering therein untrue statements as to payments to the employés of two lighthouses in the Philippines. The amount of the entries in excess of the alleged payments was in all 408 pesos, or \$204.00. A demurrer was filed to the complaint (Record, 4). The grounds of objection stated in the demurrer were: (1) That the facts charged in the complaint did not constitute a public offense; (2) that the complaint is vague, and it is impossible to deduce therefrom the facts upon which the accusation for the crime of falsification of a public document by a public official is based; (3) that the complaint is not drawn up in such a way that a person of average intelligence can understand what is alleged therein; (4) that it is impossible to understand the accusation from the vague narration in the complaint of the facts as to the entries and falsifications therein complained of; and (5) a copy of the falsified documents had not been inserted in the complaint, nor was a copy of the same attached thereto.

The demurrer was overruled by the trial court (5). This order concludes: "Said demurrer is overruled, and the defendant is ordered to plead to the complaint." It does not appear by the record that any plea was ever filed, or that the defendant was ever arraigned. All that appears in the record after the order overruling the demurrer is the opinion of the trial court concluding with a sentence of fifteen years' imprisonment (5-9); the appeal to the Supreme Court of the Philippines (10); the opinion of the Supreme Court of the Philippines, concluding with an affirmance of the judgment (10-14); a motion for a rehearing, and the overruling thereof (16-18); and the papers relating to the proceedings in taking and perfecting the writ of error from this court.

The following assignments of error were appended to the brief of the accused in the Supreme Court of the Philippines (15):

"1. The court erred in overruling the demurrer presented against the complaint.

"2. The court erred in holding that the cash book in question was a public document.

"3. The court erred in holding that the accused made false entries in said cash book.

"4. The court erred in holding that the accused was a public official within the meaning of the law governing the falsification of public documents.

"5. There is a complete variance between the manner in which the crime has been committed as alleged in the complaint and as it has been proved.

"6. There is a complete variance between the complaint and the evidence as to the official status of the accused."

In his motion for a rehearing in the Supreme Court of the Philippines, the following grounds were stated for the motion (17) :

"1. The court erred in holding that the defect in the complaint alleged by the accused was of description and form, whereas said defect is of substance, and in refusing to so hold, the court violated the clause in section 5 of the act of Congress of the United States of July 1, 1902, which says—

"That in all criminal prosecutions the accused shall enjoy the right to . . . demand the nature and cause of the accusation against him."

"2. The court erred in overruling the demurrer of the accused presented against the complaint, violating the same clause of the same act of Congress.

"3. The court erred in holding that there did not exist a substantial variance between the allegations of the complaint and the evidence introduced in support of it, again violating the clause of the act of Congress above mentioned.

"4. The court erred in holding that "the cashbook" kept by the accused was a public or official document within the meaning of the law as amended, in connection with section 300 of the Penal Code.

"5. The court erred in holding that the accused was a public official within the meaning of section 300 of the Penal Code and other recent acts bearing on the matter.

"6. The court erred in holding that the evidence establishes the guilt of the accused beyond a reasonable ground."

The petition for a rehearing was denied (17-18).

When the writ of error from this court was sued out the following assignment of errors was annexed to the petition for the writ (19) :

"1. The court erred in holding that the defect alleged by the accused in the complaint was of description and form; whereas said defect is of substance and in refusing to so hold, the court violated the clause of section 5 of the act of Congress of the United States of July 1, 1902, which says:

"That in all criminal prosecutions the accused shall enjoy the right to . . . demand the nature and cause of the accusation against him."

"2. The court erred in overruling the demurrer of the accused presented against the complaint, violating the same clause of the same act of Congress.

"3. The court erred in holding that there did not exist a variance between the allegations of the complaint and the evidence introduced in support of it, again violating the clause of the act of Congress above mentioned.

"4. The court erred in holding that the 'cash-book' kept by the accused was a public or official document within the meaning of the law as amended, in connection with section 300 of the Penal Code.

"5. The court erred in holding that the accused was a public officer within the meaning of section 300 of the Penal Code and other recent acts of the Philippine Commission.

"6. The court erred in holding that the evidence establishes the guilt of the accused beyond a reasonable doubt."

After a careful examination of the opinion of the Supreme Court of the Philippine Islands in this case, and a consideration of the fact that none of the evidence at the trial is set forth in the record, counsel for the plaintiff in error in this court has reached the conclusion that several of the questions which were presented to the Supreme Court of the Philippine Islands—which court had the evidence before it—cannot be raised in this court. Only one point raised in the courts

below will be discussed in this brief. It is the subject of the first assignment of error. And three others questions which counsel here conceives should be brought to the attention of this court were not presented to the Supreme Court of the Philippine Islands, so far as the record discloses, and are not included in the assignment of errors which were filed with the petition for a writ of error. Nevertheless, it is thought that they are of such importance that this court will exercise the right reserved to it by rule 35 and consider them, even though not raised at such a time as entitles the plaintiff in error, as a matter of right, to have them considered here.

Assignment of Errors.

1. The court below erred in overruling the demurrer to the complaint, this assignment being based upon the fact that in the complaint the plaintiff in error is described as "disbursing officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands," and the cash-book referred to in the complaint is described as a cash-book "of the captain of the port of Manila, Philippine Islands," whereas there is no such body politic as the "United States Government of the Philippine Islands."
2. The record does not disclose that the plaintiff in error was arraigned, or that he pleaded to the complaint after his demurrer was overruled and he was "ordered to plead to the complaint."
3. The record does not show that the plaintiff in error was present when he was tried, or, indeed, that he was present in court at any time.
4. The punishment of fifteen years' imprisonment was a cruel and unusual punishment, and to the extent of the sentence the judgment below should be reversed on this ground.

ARGUMENT.

I.

**IF WEEMS WAS A PUBLIC OFFICIAL OF ANY GOVERNMENT,
IT WAS THE GOVERNMENT OF THE PHILIPPINE ISLANDS, AND
NOT THE UNITED STATES GOVERNMENT.**

By the act of Congress of March 8, 1902, entitled "An act temporarily to provide revenue for the Philippine Islands and for other purposes" (32 Stat., 54), it was provided, among other things, that duties and taxes collected in the Philippine Archipelago, and duties and taxes collected in the United States upon articles coming from the Philippines shall not be covered into the general fund of the Treasury of the United States, "but shall be held as a separate fund and paid into the Treasury of the Philippine Islands, to be used and expended for the government and benefit of said islands."

The act of Congress of July 1, 1902, entitled "An act temporarily to provide for the administration of the affairs of civil government of the Philippine Islands and other purposes" (32 Stat., 691), provides a comprehensive scheme for the government of the Philippines. In a great variety of ways it distinguishes between the Government of the United States and the Government of the Philippine Islands. For instance, by section 4 it is declared that certain inhabitants of the islands and their children "shall be deemed and held to be citizens of the Philippine Islands, and as such entitled to the protection of the United States." By section 53 it is provided that "Every person above the age of twenty-one years who is a citizen of the United States or of the Philippine Islands, or who has acquired the rights of a native of said islands under and by virtue of the Treaty of Paris," shall have the right to enter vacant coal lands in the island. By section 67 it is provided that municipal bonds issued for

public improvements in the Philippine Islands "shall be exempt from the payment of all taxes or duties of the Government of the Philippine Islands or any local authority therein or the Government of the United States." In section 71 the same language is used in reference to certain sewer bonds of the city of Manila. Section 73 authorizes "the Government of the Philippine Islands" to levy and collect taxes in Manila to pay the sewer bonds in question. Section 74 empowers "the Government of the Philippine Islands" to grant certain important franchise privileges and concessions. Sections 76 to 83, inclusive, authorize the "Government of the Philippine Islands" to establish mints and issue coins. Section 81 authorizes "the Government of the Philippine Islands" to make arrangements with the Secretary of the Treasury of the United States for the coinage of subsidiary coins.

The same distinction is maintained in the act of Congress of March 2, 1903, entitled "An act to establish a standard of value and to provide for a coinage system in the Philippine Islands" (32 Stat., 952). For instance, section 6 authorizes "the government of the Philippine Islands" to issue certain certificates of indebtedness, and provides that "said certificates shall be exempt from the payment of all taxes or duties of the government of the Philippine Islands or any local authority therein or of the Government of the United States."

The same distinction is everywhere observed in the legislation of the Island government.

Section 3395 (Compilation of the Acts of the Philippine Commission, 1908) reads as follows:

"Every person, resident in the Philippine Islands, owing allegiance to the *United States* or the *government of the Philippine Islands*." . . .

Section 3396 reads:

"Every person owing allegiance to the *United States* or to the *government of the Philippine Islands*, and having knowledge of any treason against them or either of them." . . .

And section 3397:

"Any person who incites, establishes, assists or engages in any rebellion or insurrection against the authority of the *United States* or that of the *government of the Philippine Islands*."

Section 3398 lends more emphasis, for it states:

"If two or more persons conspire to overthrow, put down or destroy by force the *Government of the United States in the Philippine Islands or the government of the Philippine Islands*, or by force to prevent, hinder or delay the execution of *any law of the United States or of the Philippine Islands* or by force to seize or take any property of *the United States or of the government of the Philippine Islands*."

Section 3399 is very clear in this respect, for the *insular government* is always spoken of as an entity, and in its number 5 sets forth:

"... or the *insular government*, or the *Government of the United States or of the property of either of them*."

In section 3402 the crime of uttering libels, &c., *against the Government of the United States or the insular government of the Philippine Islands* is dealt with.

Section 2570, relating to eminent domain, states:

"*The government of the Philippine Islands* and that of any province or department thereof, or of any municipality, shall have the right to condemn private property, &c., for public use."

Section 1366, which details the duties of the attorney general, states:

"(a) He shall attend the Supreme Court and prosecute or defend therein all causes, civil or criminal, to which the *United States* or any officer thereof, in his official capacity, is a party."

"(b) He shall prosecute and defend therein all civil and criminal causes to which the government of the *Philippine*

Islands, or any officer thereof, in his official capacity is a party; and all causes to which any province may be a party, unless the interest of the province shall be adverse to that of the government of the Islands, or that of the United States or some other province."

And still more decisively:

"(c) After judgment is rendered in favor of the party represented by him in any of the cases mentioned in the preceding section, he shall direct the issuing of such process as may be necessary to carry the same into execution, and shall account for and pay to the proper officer, *all money* that may come into his possession *belonging to the Government of the United States, that of the Philippine Islands, or any province.*"

This objection does not relate to a matter of form. It is as substantial as the point involved in Carrington's case (208 U. S., 1), where a military officer of the United States was prosecuted as a civil officer of the government of the Philippines.

II.

THE FACT THAT THE RECORD IN THIS CASE DOES NOT SHOW AFFIRMATIVELY THAT THE PLAINTIFF IN ERROR WAS EVER ARRAIGNED, OR THAT HE EVER PLEAD TO THE COMPLAINT, IS A FATAL DEFECT.

In this connection it would seem to be necessary to refer only to the case of *Crain v. United States*, 162 U. S., 625. It appeared from the record in that case that there had been a trial "of the issue joined" between the United States and the plaintiff in error, but the record did not show what the issue was. It was accordingly held that the judgment must be reversed. The objection had not been made in the lower court, and does not appear to have been assigned as error in this court, although the point was mentioned at the end of the brief of the plaintiff in error. In the opinion of the

majority of the court in that case, which was delivered by Mr. Justice Harlan, the English and American cases up to that time and the leading text-books on criminal law and procedure are cited. Three members of this court dissented, but cited no authority.

The adjudications would appear to be almost uniformly to the effect that where there has been a conviction for an infamous offense, and the record does not show that the defendant was arraigned, or that he pleaded to the indictment, the judgment of conviction will be set aside.

In the case now before the court the record is much more defective than in the case of *Crain v. United States*. All it says is that when the demurrer was overruled, the plaintiff in error was ordered to plead to the complaint. It does not distinctly appear that there was any issue before the court to be determined.

The demurrer, as is customary in criminal procedure, was filed by the defendant's attorney. When a demurrer is filed the defendant is not arraigned until after the demurrer has been disposed of. The very purpose of an arraignment is to identify the person accused and to render it certain that he in person, and not through counsel, is advised of the charge against him.

In *Crain v. U. S.*, *supra*, it was decided that this court will reverse a conviction of an infamous offense for a defect of this character, even though the objection was not raised in the lower courts.

It is unnecessary to review the cases in other courts prior to that decision, because they are fully set forth by Mr. Justice Harlan in the prevailing opinion.

Since *Crain v. U. S.* was decided, a number of cases involving the same question have come before various State courts.

In *State v. Coston*, 113 La., 718, the record showed that the accused (who was charged with grand larceny), "assisted by his counsel, Wm. C. Pegues, Esq.," in open court with-

drew his plea of not guilty, and pleaded guilty to petty larceny. It was held that the conviction must be set aside because the minutes did not show affirmatively that the defendant was present in court in person when the plea of guilty was entered.

In the recent case of *State v. Cisco*, 186 Mo., 49, which was submitted to the Supreme Court of Missouri on the record, there being no appearance for the accused, the court of its own motion reversed the judgment against him because it did not affirmatively appear that the defendant had been arraigned.

In three still more recent cases in the courts of appeal in the same State, the same conclusion has been reached on the same state of facts (*State v. Sharpe*, 119 Mo. App., 386; *State v. Mikel*, 125 Mo. App., 287; *State v. Ambrose*, 125 Mo. App., 464). In the first of these cases the State conceded the point. In the second case the court expressly held that it is immaterial whether the point was made in the lower court.

In *Hamilton v. State*, 41 Southern Reporter, 940, decided in 1906, the Supreme Court of Alabama held that a conviction of larceny must be reversed because the record did not make it clear that the defendant had pleaded to the indictment.

But the most important of the recent cases on this subject is *State v. Walton*, 91 Pac., 490, which was decided by the Supreme Court of Oregon in 1907. The charge in that case was robbery. A demurrer to the indictment was overruled. Three weeks afterwards the defendant was tried and convicted. After verdict his counsel opposed his being sentenced on the ground that he had not been "fully arraigned" and had not pleaded to the indictment. The trial court held that he had waived the point by going to trial without making the objection, and sentenced him to 20 years' imprisonment. The judgment was reversed solely on the ground that there had been no arraignment or plea.

The opinion in this Oregon case contains a full and able discussion of the question involved on principle and on authority. It is said that the cases cited as sustaining a contrary conclusion, with one exception (*Martin v. Territory* 14 Okl., 593), were decided prior to *Crain v. U. S.* in this court.

III.

THE OMISSION OF ANY STATEMENT IN THE RECORD THAT THE DEFENDANT WAS PRESENT AT THE TRIAL IS ANOTHER FATAL DEFECT.

The record fails to show that Weems was ever brought into court for any purpose. There is nothing to indicate it except some statements in the opinion of the Supreme Court of the Philippine Islands as to his testimony at the trial. There is nothing in the opinion and judgment of the Court of First Instance to suggest that he testified in the case or was present at all. Certainly something more than an inference from the opinion of an appellate court is required to show that a person accused of a crime, that may be punished by a long term of imprisonment, was present at his trial. His presence was essential to a valid trial and could not be waived (1 Bish. Cr. Pro., 271; 1353).

In *Hoyt v. Utah*, 110 U. S., 574, this court set aside a conviction of murder because the examination of some of the jury panel as to their qualifications to sit in the case took place out of the presence of the accused, although neither he nor his counsel made any objection to the proceeding till after he was convicted.

IV.

THE SENTENCE IN THIS CASE IMPOSED A CRUEL AND UNUSUAL PUNISHMENT, AND FOR THAT REASON IT SHOULD BE SET ASIDE, EVEN IF THE CONVICTION BE NOT REVERSED.

A question of this kind arose in *O'Neill v. Vermont*, 144 U. S., 223. The majority of the court in that case refused to consider the question, because it was not assigned as error even in the brief of counsel for the plaintiff in error, and because the Eighth Amendment has always been held not to apply to the States of this Union, but to be a restriction upon the Government of the United States only. Mr. Justice Field and Mr. Justice Harlan filed dissenting opinions, in which they held that the provisions of the Eighth Amendment had been made to apply to the States by virtue of the provisions of the Fourteenth Amendment, and they both held that the judgment should be reversed, because the fine and imprisonment imposed in that case were cruel and unusual, and the court could take notice of plain error whether assigned or not. Mr. Justice Brewer concurred in the main with the opinion filed by Mr. Justice Harlan.

In the recent case of *Waters-Pierce Oil Company v. Texas*, 212 U. S., 111, this court seems to assume that a fine may be so unreasonable as to amount to taking property without due process of law, but in that case held that the court was "not prepared to say after confirmation of the verdict and judgment in the courts of the State that there was want of due process of law in the penalties imposed."

In the case of *Paraiso v. U. S.*, 207 U. S., 368, a case which it must be admitted is very much like the present case, the counsel for the plaintiff in error in their brief assigned as error, among other things, that the punishment was cruel and unusual, and the court declined to consider the question on the ground that the objection was not made in due season in the court below. In that case the point was

not made in the Supreme Court of the Philippine Islands until after the judgment of conviction had been affirmed in that court, when a motion for a rehearing was filed, which was overruled.

In the case at bar a motion for a rehearing was filed and overruled, but this point appears not to have occurred to counsel, and is now made in this court for the first time.

Adjudications on this question seem to be very few in number.

In *State v. G., H. & S. A. R. Co.*, 100 Tex., 153, 174, 175, the Supreme Court of Texas set aside a fine under the following clause of the constitution of that State:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

That case involved a proceeding against a railroad company to recover unpaid taxes and penalties.

The court said:

"The assessment of a penalty of one hundred per cent for the failure to pay a tax would seem to be sufficiently excessive to authorize a court to declare it to be excessive, but the assessment of more than four thousand per cent upon the amount detained can leave no possible question that the penalties are out of all proportion to the amount of money detained, and the law must be held to be void for the penalties."

Since this court seems to have held that even citizens of the United States temporarily in the Philippines are not entitled to the protection of the provisions of the Constitution of the United States relating to criminal proceedings, that instrument has not been referred to in this brief. But some of those provisions have been made applicable to the Philippine Islands by the act of Congress of July 1, 1902 (32 Stat., 51), and they seem to be sufficient for the present purpose.

By section 5 of that act it is provided: That in those islands no law shall be enacted which shall deprive any person of life, liberty, or property without due process of law.

That no person shall be held to answer to any criminal offense without due process of law.

That in all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel and to meet the witnesses face to face.

That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

It is respectfully submitted that the case should be remanded with instructions to discharge the plaintiff in error, or that the conviction should be set aside and a new trial ordered, or that the sentence should be vacated and the case sent back for a reasonable sentence.

A. S. WORRINGTON,
Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 20.

PAUL A. WEEMS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

SUPPLEMENTAL BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

In the reply brief filed in this case on behalf of the United States it is suggested that the writ of error in this case should be dismissed for want of jurisdiction.

It is submitted on behalf of the plaintiff in error that each of the questions raised by the assignments of error in the original brief filed in this case in his behalf shows that the case is one in which "a statute, * * * right or privilege of the United States is involved." (32 St., 695.) Counsel for the United States cite cases in which the question was as to the *validity* of a statute of the United States. It would seem to be obvious that there is a wide distinction between a case in which a statute of the United States is involved and one in which the inquiry is whether such a statute is valid.

Every question discussed in this case involves directly an act of the Congress of the United States.

It is unnecessary to refer on this subject to any authority except the case of *Reavis vs. Fianza*, in this court, in which

the opinion of this court, by Mr. Justice Holmes, was filed on the 1st day of November, 1909.

It is suggested in the opposing brief that this court cannot consider this case, because the questions which are raised were not made in the courts below, and a number of cases in this court in support of this contention are cited on pages 4 and 5 of the reply brief on behalf of the United States.

Here again counsel for the Government fail to note the difference between the statutes under which those cases arise and the statute which governs the jurisdiction in the present case. Nearly all the cases relied on are cases in which the court refused to take jurisdiction, because the right relied upon had not been specially set up and claimed as required by section 709 of the Revised Statutes. A few of the cases which are not governed by that section seem to counsel for the plaintiff in error to have no bearing upon the point as to which they are cited. And even in cases brought to this court by writ of error to a State court, this court has frequently held that if it can be gathered from the record that the Federal question involved must have been passed upon by the State court, the writ of error will not be dismissed, even although the record does not show affirmatively that the question was considered by, or was presented to, the State court. *Smithsonian Institution vs. St. John*, 214 U. S., 19-28; *Chicago Life Ins. Co. vs. Needles*, 113 U. S., 575-579; *Eureka Lake Company vs. Yuba Canal Company*, 116 U. S., 410; *Kaukauna Company vs. Green Bay, &c., Company*, 142 U. S., 254-269.

Moreover, the question raised here by the first assignment of error as to the distinction between an official of the United States and an official of the Philippine Islands was clearly and pointedly made in the court below, as will be seen by reading the first alleged error relied on in that court by counsel for Weems, as stated by the Supreme Court of the Philippines (Original Record, p. 12).

I.

As to the First Assignment of Error.

The first assignment of error here raises the question whether under the statutes of the United States there is any such office as "Disbursing Officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands." In support of the contention that there is no such office numerous provisions of the statutes of the United States are cited in the original brief for the plaintiff in error showing that throughout them there runs a clear distinction between the Government and officers of the Philippine Islands and the Government and officers of the United States. It may be that in a certain sense an official or employé of the Government of the Philippine Islands is an officer or employé of the Government of the United States, since the Philippine Islands are under the jurisdiction of the United States. But what we are considering here is the meaning of the acts of Congress under which the Philippine Government has been created, and since Congress in these acts has everywhere clearly distinguished between the two governments it is submitted that that distinction is to be regarded in criminal prosecutions in the Philippine Islands.

Counsel for the United States in their reply brief say that the case of *Carrington vs. United States*, 208 U. S., 1, has no bearing upon this question. Yet in that case this court made precisely the distinction upon which we rely when it said, speaking of Carrington's position: "As a soldier he was not an official of the Philippines, but of the United States."

II.

As to the claim that the Plaintiff in Error waived his right to be present throughout his trial by not raising that objection until his case came to this court.

If anything is settled in the law of criminal procedure in this court it is that due process of law requires that where corporal punishment, as distinguished from a mere fine, may be inflicted upon an accused person, if convicted, he is entitled to be present at every stage of the trial; that this is a right which he cannot waive because of the public interest in the matter; and that on appeal the judgment of conviction cannot stand unless the fact of such presence of the accused throughout the trial affirmatively appears in the record. It was so held in *Crain vs. United States*, 162 U. S., 625. In that case the objection was not made till it was made in this court.

Counsel for the Government endeavor to distinguish the Crain case from this by saying that in that case the court had jurisdiction on other points in the case. It has been shown above that there is jurisdiction in this case under the point made in the first assignment of error. But if that were not so why should the jurisdiction depend upon whether the errors relied on were urged in the court below when the statute giving the right of appeal makes no such restriction? If Weems had been sentenced to death by torture would he be turned out of this court after he had duly perfected an appeal because neither he nor his counsel had objected below to such punishment as cruel and unusual? Would it not rather be said that the court from which the case comes will be deemed to have passed upon that question whether the record so states or not?

If such a sentence had been inflicted in the Supreme Court of the Philippines and the case were brought here by

writ of error, would the court pay any attention to a consent in writing by the accused and his counsel that he might be tortured to death if no other error should be found in the record? And if a plaintiff in error cannot expressly waive such an objection in the lower court or in this court why should he be held to have waived it by implication because he did not make it before his case came here?

It is well, in this connection, to remember the language of Mr. Justice Harlan, speaking for the court in *Hopt vs. Utah*, 110 U. S., 574, 579. He said:

"We are of the opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com., 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Com., 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally

present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, *such deprivation would be without that due process of law required by the Constitution.*"

So in *Lewis v. United States*, 146 U. S., 370, it was again held that in trials for felonies, it is not in the power of the prisoner in person, or through his counsel, to waive the right to be personally present during the trial—that after judgment found nothing shall be done in his absence.

The identical provision of the Constitution here referred to in *Hopt. v. Utah* is carried into the Philippines by section 5 of the organic act of July 1, 1902 (32 Stat., 691).

Assuming, then, that this court has jurisdiction, some of the points urged in the original brief for the plaintiff in error will be further considered.

III.

As to the Third Assignment of Error.

In addition to the cases in the State courts cited in the original brief, to the effect that in cases where corporal punishment is inflicted the record must show the presence of the accused during the entire trial, the following cases sustain our contention: *Hooker vs. Commonwealth*, 13 Grat. 763-766, in which a conviction of arson was reversed because the record failed to show the personal presence of the accused when a motion to set aside a verdict as against evidence was made, and when that motion was overruled on a subsequent day; *Smith vs. People*, 8 Colorado, 547-458, where a conviction of receiving stolen property was set aside because the record failed to show the presence of the prisoner when the verdict was rendered; *State vs. Jones*, 61 Mo., 232-235, in which a conviction of rape was set aside

because the record failed to show affirmatively that the accused was personally present during the trial; *State vs. Matthews*, 20 Mo., 55, 56, 57, in which a conviction for hog stealing was reversed because the record failed to show the presence of the prisoner in court until he was brought in for sentence after the verdict was rendered; *Harris vs. State*, 130 Ill., 457-465, setting aside a sentence in a case where the accused had been convicted of forgery because, although the record showed affirmatively his presence in court up to the time of sentence, it did not show that he was present when sentenced; *Peters vs. State*, 39 Ala., 681; *Gibson vs. State*, 39 Ala., 693, and *Eliza vs. State*, 39 Ala., 693-696, all cases in which convictions for larceny were set aside because the record did not show that the accused was present, in the first two cases when he was sentenced, and in the other case during the trial; *Shelton vs. Commonwealth*, 89 Va., 450-453, in which a conviction for burglary was set aside because the record did not show that the defendant was present in court when the "case was continued for the defendant"; *Cole vs. State*, 10 Ark., 318, 324, in which case a judgment in a case of conviction of assault with intent to kill was set aside because the record did not show that the defendant was present when the verdict was rendered or when he was sentenced; *Long vs. State*, 52 Miss., 23-34, setting aside a conviction of murder because the record did not show that the accused was present at the hearing of a motion to quash the indictment, and *Palmquist vs. State*, 30 Fla., 73, reversing the judgment in a case in which the accused was charged with keeping a room for gambling purposes because, among other things, the record did not show that the defendant was present throughout the trial.

Indeed, the doctrine now invoked has been sustained by the very court from which this case comes.

Section 41 of General Orders No. 58 of the Governor of the Philippine Islands, issued April 23, 1900, provides, among other things, as follows:

"The defendant must be personally present at the time of pronouncing judgment, if the conviction is for a felony; if for a misdemeanor the judgment may be pronounced in his absence."

In *United States vs. Karelson*, 3 Philippine Reports, 223, the Supreme Court of the Philippine Islands reversed a sentence because it was not made in the presence of the accused, but was announced to him in jail by the clerk of the court. The court said:

"In all criminal prosecutions the accused has an absolute right to be personally present during the entire proceeding from arraignment to sentence, if he so desires. In cases of felony he cannot waive this right. The court in a case of felony must insist upon the presence of the accused in court during every step in the trial. The record must also show that the accused was present at every stage of the prosecution (*Hopt vs. Utah*, 110 U. S., 574), and it is not within the power of the court, the accused, or his counsel, to dispense with the provisions of General Orders No. 58 (section 41), as to the personal presence of the accused at the trial. We mean by the phrase 'at the trial' to include everything that is done in the course of the trial from the arraignment until after sentence is announced by the judge in open court."

In the case at bar the record now shows that the plaintiff in error appeared in court in person and plead not guilty. It does not show that he was present in court at any time after his arraignment.

In the original brief for the plaintiff in error it is said that there were certain statements in the opinion in the record of the Supreme Court of the Philippine Islands as to the testimony of the plaintiff in error "at the trial." This is not correct. All that appears in the opinion of the Supreme Court of the Philippine Islands on this subject (Record, 11) is that the accused made certain admissions and gave certain explanations, but it does not state that he

did this at the trial. There is nothing to indicate whether the admissions and the explanations referred to were made in or out of court. Even if the record disclosed that the plaintiff in error had testified at his trial, it would make no difference because it must show affirmatively that he was present all the time during the trial and when he was sentenced.

The record in this case is fatally defective, not only because it does not show that the appellant was present at any time during his trial in the court of First Instance, but also because it fails to show that he was present when his case was heard in the Supreme Court of the Philippine Islands. Under the laws in force in the Philippines when the United States occupied those Islands, as will be seen below, an appeal by one convicted of crime to the Supreme Court of the Islands took the case to the latter court for trial *de novo* on the evidence sent up by the Court of First Instance. By section 50 of General Orders No. 58 it was provided that the record of all cases in which the death penalty or imprisonment exceeding one year, or a fine exceeding 250 pesos, shall have been imposed in the Court of First Instance, shall be forwarded to the Supreme Court, and that those cases "shall take the same course as is now provided by law." Hence up to the present time the Supreme Court of the Philippines in cases like the one now before this court retries the case on the same evidence. It may, and often does, increase the penalty. It was decided by that court in *United States vs. Padilla*, 4 Philippine Reports, 511, that the hearing of a criminal case on appeal by the defendant is not a second trial (because in that case former jeopardy could be pleaded), but a continuation of the same trial, and in that very case the judgment of the Court of First Instance was reversed and a severer penalty was inflicted. So in *United States vs. Ravedes*, 3 Philippine Reports, 121, in a concurring opinion which assumes to speak for the entire court, it is said that the fact that the accused is not finally tried in a case

on appeal until his case is heard and retried and determined by the Supreme Court is a weighty reason for the exercise of the discretion of the court to let to bail pending the appeal. In that case the court cites *United States vs. Kepner*, "1 Off. Gazette, 353," as determining that the trial of a criminal case in the Court of First Instance is merely advisory to the appellate tribunal.

The judgment in favor of the Government in Kepner's case was reversed by this court (195 U. S., 100), but solely on the ground an *acquittal* in the Court of First Instance could be set up as a bar to a retrial in the Supreme Court. In *Trono v. United States*, 199 U. S., 521, the action of the Supreme Court of the Philippines was sustained, when the appeal was by the prisoners, in increasing very materially certain sentences imposed by the Court of First Instance.

And that the hearing in the Supreme Court is a retrial is held also in *Serra v. Mortiga*, 204 U. S., 470.

Hence it is essential to due process of law that the accused shall be present in the Supreme Court as well as the Court of First Instance, when his case is under consideration, and as section 5 of the act of Congress of July 10, 1902 (32 Stat., 691), provides "that no person shall be held to answer to any criminal offense without due process of law," and as this court has held in *Crain vs. United States*, *supra*, and other cases, that a defect of this kind is fatal, it would seem that for this reason alone the judgment in this case cannot stand.

IV.

As to the Fourth Assignment of Error, raising the question of cruel and unusual punishment.

In the original brief on behalf of the plaintiff in error little was said on this subject, because, as the record then stood, it seemed to his counsel that the judgment must be set aside and a new trial had because of the absence

from the record of any evidence that the accused had ever been arraigned or required to plead. A fuller examination of the laws under which this case was tried leads counsel for the plaintiff in error now to submit to this court whether this sentence, or any sentence inflicted pursuant to the statute under which this prosecution was conducted, can be permitted to stand.

The information or complaint with which the record in this case begins is drawn under article 300 of the penal code of the Philippines, which provides that the penalties of *cadena temporal* and a fine of from 1,250 to 12,500 pesetas "shall be imposed on the public official who taking advantage of his authority shall commit a falsification * * *

4. By perverting the truth in the narration of facts."

The chapter of which this section forms a part is entitled:

"Falsification of Documents."

"SECTION 1. Falsification of Official and Commercial Documents and Telegraphic Dispatches."

The punishment provided for violation of this section is imprisonment for not less than twelve years and one day and not more than twenty years and certain "accessories" referred to below.

The sentence imposed in this case by the Court of First Instance and which was affirmed by the Supreme Court of the Philippines is as follows (Original Record, 9):

"Therefore, I sentence the accused, Paul A. Weems, to the penalty of fifteen years of *cadena*, together with the accessories of section 56 of the Penal Code, and to pay a fine of 4,000 pesetas, but not to suffer imprisonment as a subsidiary punishment in case of his insolvency, on account of the nature of the main penalty, and to pay the costs of this cause."

The "accessories of section 56" are as follows:

- (1) "Civil interdiction of the person punished during the sentence."
- (2) "Perpetual absolute disqualification."
- (3) "Subjection to surveillance during life."

"Perpetual absolute disqualification" is defined by section 31 to mean the perpetual deprivation of the right to vote or hold office. "Subjection to surveillance during life" is defined by section 43 to include the requirement on the part of the convicted person of giving notice of his domicile to the "authority" in charge of his surveillance and forbids him to change his domicile without the permission in writing of such authority.

The crime of which this plaintiff in error has been convicted does not impute to him any moral turpitude. The judge who convicted him in the Court of First Instance in his opinion said (original record, 7-8):

"In the case at bar no discussion is made about the falsification of a private document, in which it is necessary that the falsification should have been committed to the damage of a third party or with the intention of causing said damage. The law does not require the concurrence of these circumstances to punish the crime of falsification of a public document, because it takes into consideration the essential difference which exists between these two classes of documents, the object for which they are drawn, and the effect of any alteration that may be made in one or the other. It is not necessary that there be any fraud nor even the desire to defraud, nor intention of personal gain on the part of the person committing it. That a falsification of a public document be punishable; it is sufficient that the one who committed it had the intention to prevent [pervert?] the truth and to falsify the document and that by it damage might result to a third party."

The discussion here referred to doubtless grew out of the fact that it was contended by the accused that he had taken receipts in full, and entered payments as made in full in his book, expecting and intending to pay the balance due to the employees concerned on his next trip to the lighthouse, and that before he was arrested he had actually put the balance due each of the men in envelopes addressed to them and

had placed the envelopes where they would be sent to them on the next trip.

The supplemental record sent to this court in response to the writ of certiorari shows (pages 12-13) that the money which was in these envelopes was found to be "a part of the "official funds of said Paul A. Weems and that it had been "deposited to his credit."

It is manifest that the sentence was imposed in this case by the Court of First Instance for Weems' offense in entering in his record book the payment of more money to the lighthouse employees than had actually been paid, without regard to whether as a matter of fact he intended to pay the amount in full or had any intention of defrauding those employees. The Supreme Court of the Philippines was evidently not favorably impressed with his claim that he intended to pay the men in full, but the statute under which he was prosecuted does not make an intention to defraud an ingredient of the offense it denounces.

Section 300 of the penal code requires that the court in case of a conviction under that section shall sentence the accused to imprisonment for not less than twelve years and one day and not more than twenty years. Hence, even if this court should merely reverse this sentence and send the case back to the Supreme Court of the Philippine Islands for a re-sentence, that court would be required, if section 300 is to be enforced in its terms, to resentence Weems to imprisonment for at least twelve years and one day. Therefore, unless this court shall interfere, this plaintiff in error for the offense of taking credit in his record for a little over two hundred dollars more than he had actually paid, must pay a fine of ten times the amount withheld by him and must suffer imprisonment *incommunicado* for at least twelve years, and will, during the remainder of his life, be deprived of the right to vote or hold office, and live the life of a convict in that he must report to some official where he

resides when his term expires and obtain the permission of that official, whoever he may be, before he can live anywhere else. He cannot even come back to the United States, where he was born and reared, unless some now unknown and un-designated official chooses to give him that liberty. As section 5 of the act of Congress of July 1, 1902 (32 Stat., 691), provides that in the Philippines "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted" it would seem to be proper for this court now to say whether such a punishment for such an offence is cruel and unusual within the meaning of that act.

The language of the act is the same as that of the Eighth Amendment to the Constitution of the United States, except that the word "punishment" is used instead of "punishments."

In *Pervear vs. Com.*, 5 Wall., 475, this court held that the Eighth Amendment is not applicable to the States, but remarked further that nothing excessive, cruel or unusual was perceived in punishing the keeping of a liquor saloon without license by a fine of \$50 and imprisonment for three months in a house of correction. In *Kemmer's case*, 136 U. S., 436, 446, it was held that the punishment of death is not cruel within the meaning of that word as used in the Eighth Amendment, even if death be inflicted by electrocution. In *Wilkerson vs. Utah*, 99 U. S., 130, the punishment of death by shooting was held not to be cruel and unusual punishment. In *Howard vs. Fleming*, 191 U. S., 126, 135, it was held that sentence by a State court which punished conspiracy to defraud (by the gold-brick scheme) by imprisonment for ten years, could not be considered a cruel and unusual punishment, especially after it had been sustained by the Supreme Court of the State.

It is obvious that none of these decisions affects the present case.

This court declined to consider the question of cruel and

unusual punishment in Paraiso's case, 207 U. S., 368, because it was not presented by any assignment of error.

In that case the accused was a tax collector and had committed numerous offences of embezzlement of money received by him from different taxpayers. The case was analogous therefore to *State vs. O'Neil*, 58 Vermont, 140-165, in which case the defendant had been found guilty of 307 separate offenses of selling intoxicating liquor without authority, and had been fined \$6,638.72. His sentence further ordered that he should be committed until the sentence should be complied with, three days for each dollar of the fine—a period of over fifty-four years. The Supreme Court of Vermont held that this sentence was not a violation of a provision of the constitution of Vermont, prohibiting cruel and unusual punishments or excessive fines. In the course of its opinion the court said:

"The constitutional inhibition of cruel and unusual punishments, or excessive fines or bail, has no application. The punishment imposed by statute for the offense with which the respondent, O'Neil, is charged, cannot be said to be excessive or oppressive. If he has subjected himself to a severe penalty, it is simply because he has committed a *great many* such offenses. It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary, on the ground that he had committed so many burglaries that, if punishment for each were inflicted upon him, he might be kept in prison for life. The mere fact that cumulative punishments may be imposed for distinct offenses in the same prosecution is not material upon this question. *If the penalty were unreasonably severe for a single offense*, the constitutional question might be urged; but here the unreasonableness is only in the number of offenses which the respondent has committed."

The foregoing case was brought to this court by writ of error. After a hearing in this court the writ was dismissed

(144 U. S., 323). The majority of the court held that no Federal question was involved in the case under the Eighth Amendment, because that amendment does not apply to the States. Mr. Justice Field and Mr. Justice Harlan delivered dissenting opinions, in the latter, of which Mr. Justice Brewer concurred in the main. These dissenting opinions are too long to be set out here even in substance, but they are relied upon as the strongest presentation of the proposition upon which this plaintiff in error relies that counsel have been able to find.

In Cooley's Constitutional Limitations (7th ed.), page 471, the author says:

"There may be cases in which a punishment, though not beyond any limit fixed by statute is nevertheless so clearly excessive as to be erroneous in law. A fine should have some reference to the party's ability to pay it. By Magna Charta a freeman was not to be amerced for a small fault, but according to the degree of the fault, and for a great crime in proportion to the heinousness of it, *saving to him his contenement*; and after the same manner a merchant, *saving to him his merchandise*. And a villain was to be amerced after the same manner, *saving to him his wainage*. The merciful spirit of these provisions addresses itself to the criminal courts of the American States through the provisions of their constitutions."

In Maxwell's Criminal Procedure, page 661, occurs the following passage, which is cited with approval by the court in *Charles vs. State*, 27 Neb., 881:

"There is certainly a great difference in the character of the offense between the hardened villain who waylays and robs his victim, or who burglariously enters your dwelling at night with the intent to steal and murder if necessary, and the young man of previously good character, who has been guilty of some act which barely makes him criminally liable. In the one case the full punishment allowed by law, perhaps would not be too severe, particularly if the

party had been previously convicted of a similar offense, while in the other, if the law will permit a punishment other than by imprisonment in the penitentiary and the consequent infamy, it might, and probably would, have the effect thereafter to make him a law-abiding citizen. In no case should the sentence exceed the bounds of just punishment. But little reformation may be expected from a prisoner smarting under a disproportionate and unjust sentence. The fact that he has been convicted of a crime does not authorize the courts to deprive him of those rights which the law still recognizes, nor to treat him as one having no rights."

In *Stoutenburg vs. Frazier*, 16 D. C. App., 229, an act of Congress was held to be unconstitutional which provided, among other things, that "all suspicious persons" should upon conviction be fined not exceeding forty dollars or required to give security for their good behavior for six months. Chief Justice Alvey, in delivering the opinion of the court in that case, said:

"It would clearly be a cruel and unnatural [unusual?] punishment to impose a fine and imprisonment upon a party because he might happen to be regarded by some persons as a suspicious person without anything more."

In *State vs. Driver*, 78 N. C., 423, which was brought to the Supreme Court of North Carolina by certiorari, the petitioner for assaulting his wife had been sentenced to imprisonment in jail for five years. The constitution of North Carolina prohibited cruel and unusual punishment. It was held that the punishment was unusual because it was excessive. The opinion in the case is able and elaborate. In it the court cites the case of *Lord Devonshire*, 11 State Trials, 1354, in which the House of Lords held that a fine of £30,000 "was excessive and exorbitant, against Magna Charta, and the common right of the subject and the laws of the land."

The court concludes:

"Thus it appears both by precedent, and by the reason of the thing, and by express constitutional provision, that there is a limit to the power of the judge to punish, even when it is expressly left to his discretion. What the precise limit is, cannot be prescribed. The Constitution does not fix it, precedents do not fix it, and we cannot fix it, and it ought not to be fixed. It ought to be left to the judge who inflicts it under the circumstances of each case, and it ought not to be abused, and has not been abused (grossly) in a century, and probably will not be in a century to come, and it ought not to be interfered with, except in a case like the present, where the abuse is palpable. And when that is the case, then the sleeping power of the Constitution must be waked up to protect the oppressed citizen. The power is there, not so much to draw a fine line close up to which the judges may come, but as a 'warning' to keep them clear away from it."

In *Hobbs vs. State*, 32 N. E. Rep., 1019, the Supreme Court of Indiana sustained, against a prohibition in the State constitution of cruel and unusual punishments, a statute which punished "riotous conspiracies" by imprisonment for not less than two nor more than ten years. The court said:

"It may well be considered whether in this country, at the close of the nineteenth century, and in this State, where there are no common-law crimes, and where the legislative department of the government is intrusted with the duty of defining crimes and prescribing punishments, this provision of the constitution is not obsolete, except so far as it may admonish the courts against the infliction of punishments so severe as not to 'fit the crime.'"

In *Johnson vs. Waukesha Company*, 64 Wis., 281-288, the court had under consideration the so-called "Tramp Law" of Wisconsin. Without deciding whether that act was constitutional, the court said it was not certain that the punish-

ment of a tramp by imprisonment in the county jail for fifteen days upon a diet of bread and water alone was not a violation of a section of the Wisconsin constitution which forbids "cruel and unusual punishments."

In *Matter of Frazee*, 63 Mich., 397-408, the Supreme Court of Michigan, referring to an ordinance which punished marching in the streets of the city with banners and music or with singing and shouting without the consent of the mayor or common council, said:

"No one in his senses would regard a penalty of \$500 for such trivial offenses as most of those covered by this by-law as within any bound of reason. The penalties must be fixed with regard to the offense. They cannot all be thrown in together, large and small, under the same measure of punishment."

In *People vs. Murray*, 76 Mich., 10, the respondent had been convicted of rape of a girl under fourteen years of age, and had been sentenced to imprisonment for fifty years. When the offense was committed the accused was intoxicated, and there were some other circumstances which seemed to mitigate the seriousness of the offense. The Supreme Court of Michigan reversed the judgment in the case for errors at the trial, but commented upon the severity of the sentence as being in violation of a clause of the State constitution prohibiting unusual punishments. The court said, further:

"It will not do to say the executive may apply the remedy in such a case. We do not know what the executive may do, and it is but a poor commentary upon the judiciary when it becomes necessary for the executive to regulate the humanity of the bench."

In *State vs. Whitaker*, 48 Louisiana Annual, a judgment was held void under a constitutional provision identical with the Eighth Amendment, because it sentenced the relators to imprisonment for 2,160 days in default of their paying fines aggregating \$720. Their offense was trespass on the public

parks of New Orleans, and they had been convicted of 72 distinct violations of a city ordinance—all the offenses having been committed in the space of one hour and forty minutes.

The Arkansas Constitution of 1874, article 4, section 9, prohibits cruel and unusual punishments.

In *Thomas vs. Kincaid*, 55 Ark., 502, it is said, referring to this provision, that the legislature could not "inflict the death penalty as a punishment for a simple misdemeanor."

In *Martin vs. Johnston*, 33 S. W. Rep., 303-309, it was held that where a statute fixes a minimum penalty but gives the court or jury a discretion to go beyond it such discretion must be exercised in reason and justice and in subordination to the constitutional provision prohibiting cruel and unusual punishments.

In *State vs. Baker*, 3d South Dakota, 2941, there was under consideration a sentence of ninety days' imprisonment for maintaining a nuisance. The court said:

"It is certain that it devolves upon the legislature to fix the punishment for crime and that in the exercise of their judgment great latitude must be allowed; and the courts can reasonably interfere only when the punishment is so excessive or so cruel as to meet the disapproval and condemnation of the conscience and reason of men generally.

* * * * *

"It is a very noticeable fact that this question has seldom been presented to the courts and we take this fact to signify that it has been the common understanding of all that courts would not be justified in interfering with the discretion and judgment of the legislature, except in very extreme cases, where the punishment proposed is so severe and out of proportion to the offense as to shock public sentiment and violate the judgment of reasonable people."

In *Matter of Bayard*, 63 Howard, 73, it was held by the Supreme Court of New York (Third Department), that imprisonment for one year was not a cruel and unusual punish-

ment in that case. The court inclined to the view that the prohibition of the State constitution did not apply to degrees of punishment, but adds that the text writers seem to understand that "cruel and unusual" applies also to "punishments so disproportionate to the offense as to shock the sense of the community."

Whether the punishment in a given case is cruel or unusual depends, of course, in some degree, upon the punishment inflicted for other offences. An examination of the statutes of the United States and of the District of Columbia and of the laws governing prosecutions in the Philippines shows the following results:

The penal laws of the United States were revised and amended by act of Congress approved March 4, 1909 (35 Stat. at Large, 1088).

The following is a statement of the terms of imprisonment and *maximum* fines prescribed for various offenses by that act:

Section 3, misprision of treason, not more than seven years, and \$5,000.

Section 4, inciting rebellion, not more than ten years, and \$10,000.

Section 5, criminal correspondence with foreign governments, not more than three years, and \$5,000.

Section 6, conspiracy to destroy the government by force, not more than six years, and \$5,000.

Section 7, recruiting soldiers in the United States to fight against the United States, not more than five years, and \$1,000.

Section 27, forgery of letters patent, not more than ten years, and \$5,000.

Section 28, forgery of bonds and other instruments for the purpose of defrauding the United States, not more than ten years, and \$1,000.

Section 31, false acknowledgments, not more than two years, and \$2,000.

Section 35, presenting false claims against the government, not more than five years, and \$5,000.

Section 37, conspiracy to defraud the United States, not more than two years, and \$10,000.

Section 47, embezzling or stealing from the United States, not more than five years, and \$5,000.

Section 65, using a deadly weapon on a customs officer, not more than ten years.

Sections 110 and 111, bribing a Congressman, not more than three years, and three times the amount of the bribe.

Section 125, perjury, not more than five years, and \$2,000.

Section 275, murder in second degree, imprisonment for not less than ten years.

Section 275, voluntary manslaughter, not more than ten years.

Section 283, maiming another by putting out his eye, cutting out his tongue, or cutting off a limb, not more than three years, and \$1,000.

Section 284, robbery, not more than fifteen years.

Section 287, grand larceny, not more than ten years, and \$10,000.

Section 86, provides a punishment for substantially the same offense of which Weems has been convicted in this case. It reads as follows:

“Whoever, being an officer, clerk, agent, employee, or other person charged with the payment of any appropriation made by Congress, shall pay to any clerk or other employee of the United States a sum less than that provided by law, and require such employee to receipt or give a voucher for an amount greater than that actually paid to and received by him, is guilty of embezzlement, and shall be fined in double the amount so withheld from any employee of the Government and imprisoned not more than two years.”

The code of laws for the District of Columbia, which was approved March 3, 1901, punishes the following crimes in the manner hereinbelow indicated:

Section 802, manslaughter, imprisonment not exceeding fifteen years.

Section 803, assault with intent to kill, rape, or rob, not exceeding fifteen years.

Section 804, assault with intent to commit mayhem, not more than ten years.

Section 807, mayhem, not more than ten years.

Section 810, robbery, imprisonment not less than six months nor more than fifteen years.

Section 820, arson, not less than one year nor more than ten years.

Section 823, burglary (housebreaking), not more than fifteen years.

Section 826, grand larceny, not less than one year nor more than ten years.

Section 843, forgery, not less than one year nor more than ten years.

Section 858, perjury, not less than two years nor more than ten years.

It will be seen, then, in nearly all of these cases, either in the Federal Statutes or in the District Code, there is no minimum term of imprisonment. A law requiring a convicted person to be imprisoned *for not less than twelve years* cannot be found, it is believed, in any statute in this country save for the most enormous crimes. Certainly no such law exists in the United States so punishing such a petty offense as that of which this plaintiff in error has been convicted.

As to Punishment for Crime in the Philippine Islands.

It is not to be denied that under the Philippine laws some crimes are punished with a severity unknown to any jurisdiction in the United States. But even there this sentence

is oppressive to the last degree. The following are illustrations of penalties prescribed in the Philippines for other crimes:

By section 390 of the Penal Code a public official who embezzles public funds can be punished as severely as the plaintiff in error in this case was punished only if the amount of his embezzlement exceeds 125,000 pesetas.

By part IX, title 44, of Compilation of the Acts of the Philippine Commission (1907) the following punishments, among others, are inflicted:

Section 3395, treason, imprisonment not less than five years nor more than twenty years and a fine of not less than 20,000 pesos.

Section 3396, misprision of treason, imprisonment not more than ten years and fine not more than 2,000 pesos.

Section 3398, conspiracy to overthrow the Government of the United States in the Philippine Islands or the Government of the Philippine Islands, imprisonment not exceeding six years and fine not over 10,000 pesos.

Sections 3399 and 3400, sedition, imprisonment not exceeding ten years and fine not over 10,000 pesos.

Section 3420, embezzlement of public funds, imprisonment for not less than two years nor more than ten years and fine not more than the amount embezzled.

Section 3440, perjury and subornation of perjury, imprisonment not more than five years and fine not exceeding 2,000 pesos.

Sections 3466 and 3467, counterfeiting and forgery of Government securities or bank notes, imprisonment not less than five years nor more than fifteen years and fine not exceeding 10,000 pesos.

Thus, even under Philippine laws, one who is guilty of treason or misprision of treason or conspiracy to overthrow the Government of the United States or sedition or perjury may be sent to prison for only thirty days and, except only in case of treason, cannot be imprisoned for a longer term

than from six to ten years; and one who embezzles any sum, however great, cannot be imprisoned for more than ten years, and may escape with two years. And if Weems in the Philippines had forged a Government security of the apparent value of a hundred thousand dollars, the court would have had the power to send him to prison for five years.

It is respectfully submitted that the judgment in this case should be reversed and the case remanded to the Philippine Courts with instructions to discharge the plaintiff in error.

A. S. WORTHINGTON,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

PAUL A. WEEMS, plaintiff in error, }
v. } No. 193.
THE UNITED STATES. }

SUGGESTION AS TO DIMINUTION OF RECORD AND PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

The Solicitor-General, on behalf of the petitioner, the United States, respectfully suggests a diminution of the record in this case, and prays for a writ of certiorari to require the clerk of the Supreme Court of the Philippine Islands to forward to this court a full and correct transcript of the record therein.

The defects in the record as it now appears in this court, and the grounds upon which said writ is asked, are as follows:

It does not appear affirmatively in the record now on file in this court that plaintiff in error, Paul A. Weems, was arraigned, or that he pleaded to the complaint after his demurrer was overruled, nor is there any order of record showing that he was present during the trial in the Court of First Instance.

The clerk's certificate to the record on file recites that the 43 pages of typewriting contain a true and

correct copy of so much of the record and proceedings in the case of *Paul A. Weems, plaintiff in error, v. The United States, defendant in error*, as the parties have by written stipulation agreed to forward to the Supreme Court of the United States at Washington, D. C. (Rec., p. 23.)

On page 15 of the printed record appears the following agreement:

In the above entitled cause, in view of the fact that the court will not revise the findings of fact on writ of error, it is agreed that the evidence may be omitted from the transcript.

This is perhaps the agreement referred to in the clerk's certificate, but it does not appear therein that it was agreed that any entries made upon the minute books should be omitted.

While the typewritten transcript of record was filed in this court on October 14, 1907, yet petitioner was not furnished a printed copy of same until March 3, 1909. Petitioner, by the then Solicitor-General, very shortly thereafter made an examination of the printed record and prepared a brief wherein was considered the questions presented in the court below, and said brief was filed in this court on March 27, 1909. Between that date and March 31, 1909, a copy of this brief was furnished counsel for plaintiff in error. It appears from said printed record that no question was raised either in the Court of First Instance, or in the Supreme Court of the Philippine Islands, as to the defects above mentioned, and the first intimation that petitioner had that such defects would be relied

upon in this court was on Saturday, April 24, when counsel for plaintiff in error, by telephone, notified a representative of petitioner that he expected to rely upon the fact that the record failed to disclose that plaintiff in error was arraigned and filed a plea to the information. Said counsel, however, did not at that time inform petitioner that he expected to call in question the fact that the record failed to recite that plaintiff in error was present during the trial in the Court of First Instance. In consequence of the information thus obtained, petitioner, through the War Department, inquired by wire of the attorney-general of the Philippine Islands, with reference to the alleged defect that plaintiff in error was not arraigned and did not plead to the complaint, and in response thereto a telegram was received upon this date, April 28, stating:

Referring to telegram from your office of the 24th instant, Weems's record shows arraignment in due form and plea of not guilty.

Petitioner did not receive brief of counsel for plaintiff in error until Monday, April 26, and was not notified, until he received same, that any question would be made as to the failure of the record to show that plaintiff in error was not present during the trial, and consequently no inquiry has been made as to said defect; but, inasmuch as the record in the other particular appears in fact to be regular, petitioner verily believes the record made in the Court of First Instance was true and perfect in every respect.

For the foregoing reasons petitioner asks that this cause be continued until the next term of this honorable court, and that a writ of certiorari be issued directing the clerk of the Supreme Court of the Philippine Islands to prepare and forward to the clerk of this court all parts of the record in this cause which have been omitted from the record now on file, except the evidence which, under the stipulation filed by counsel for both parties in the Supreme Court of the Philippine Islands, was properly omitted by the clerk.

LLOYD W. BOWERS,
Solicitor-General.

J. A. FOWLER,
Assistant Attorney-General.

DISTRICT OF COLUMBIA, ss.:

Before the undersigned notary public in and for said District of Columbia, personally appeared James A. Fowler, who, having been by me duly sworn, upon his oath says, that he is Assistant Attorney-General of the United States, and has had the defense of the case of *Paul A. Weems v. The United States*, in the Supreme Court of the United States, specially in charge, and that the facts stated in the foregoing petition as on personal knowledge are true, and those stated on information and belief he verily believes to be true.

J. A. FOWLER.

Subscribed and sworn to before me this 29th day of April, 1909.

[SEAL]

CHAS. B. SORNBORGER,
Notary Public, D. C.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

PAUL A. WEEMS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 193.

*IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE
ISLANDS.*

BRIEF FOR THE UNITED STATES.

This is a writ of error to the supreme court of the Philippine Islands, which brings into this court for review a judgment of conviction of the crime of falsification of a public document by a public official.

The defendant was accused of that offense by complaint in the court of first instance (Rec., pp. 1, 2); he demurred; the demurrer was overruled (pp. 4, 5); he was convicted and sentenced to fifteen years' imprisonment and to pay a fine of \$800 (pp. 5-10); the conviction was affirmed by the supreme court of the Philippines (all concurring; pp. 10-14); a petition for rehearing was denied (pp. 16-18).

The errors assigned in this court are based on the grounds that—

The complaint violated the Philippine Bill of Rights in not sufficiently stating the nature and cause of the accusation, and because of an alleged variance between the complaint and the evidence (sec. 5, act of July 1, 1902, 32 Stat., 691, 692);

That the book or document in question was not a public or official document and the accused was not a public officer within the meaning of the law.

That the guilt of the accused was not established by evidence beyond a reasonable doubt.

The court has had occasion to consider the offense charged here in two recent cases (*Paraiso v. United States*, 207 U. S., 368; *Carrington v. United States*, 208 U. S., 1).

There is no question of fact. The facts are found by the trial court on the evidence, and are restated and confirmed by the appellate court in the exercise of its revisory power over matter of fact as well as of law. Both courts proceeded in accordance with their well-established functions and powers under the Philippine system of law and procedure as approved by this court (*Dorr v. United States*, 195 U. S., 138; *Trono v. United States*, 199 U. S., 521); and, apart from the fact that there is no bill of exceptions with the evidence before this court, the facts here appear as conclusively and finally as if they rested upon the verdict of a jury.

Therefore the assignment of error as to a variance between the complaint and the evidence must fail. That objection appears to be the occasion of the comment of the trial court on the contentions of counsel respecting the weight that should be given to the facts proved. The appellate court pays no attention to the point (see Rec., top p. 12). The objection would fail even if the evidence were before this court. In any such case of course this court would not regard a question of the weight of the evidence.

It is found and held by the court below that "the guilt of the accused was established beyond a reasonable doubt" (Rec., p. 14). This court will not review that finding for the reasons already suggested.

As to the objection that there was a violation of the guarantee that "the accused shall enjoy the right to * * * demand the nature and cause of the accusation against him," the complaint is not vague nor the accusation impossible to understand. The charge is clear and precise, the description of the document and the narration of fact sufficient. The pleading speaks for itself.

The appellate court, for example, commenting on section 10 of General Orders, No. 58, as to insufficiency of the complaint in matter of form, says:

The alleged defect in the complaint could not "prejudice any substantial right of the defendant upon the merits," as the language used left no room for doubt as to the bureau which it was intended to designate (p. 12). 

The objection is familiar. The court commented on it in the Paraiso case, where it was advanced with quite as much force and reason, and added as to such an objection generally:

The Bill of Rights for the Philippines giving the accused the right to demand the nature and cause of the accusation against him does not fasten forever upon those islands the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert. (207 U. S., at pp. 371-372.)

There are only two real questions in the case: (1) Whether the accused was a public officer; (2) whether the document which he falsified was a public or official document.

The complaint denominates him "a public official of the United States Government of the Philippine Islands, to wit, a duly appointed, qualified, and acting disbursing officer of the Bureau of Coast Guard and Transportation." The court of first instance states that it was proved at the trial that the accused was "a public official or official paymaster, with the title of disbursing officer of the Bureau of Coast Guard and Transportation," and that it was his duty as such to pay the salaries of the employees of the light-houses of the archipelago, and that as such he kept a cashbook pertaining to the bureau which was a part of the office of the captain of the

port of Manila, and that, having received from the insular treasury the funds to make payments, he made an entry under date of June 22, 1904, relating to the light-house pay rolls that he had paid 204 pesos and 408 pesos for the salaries of the employees of two light-houses, respectively, for certain months, which was not a true entry.

The precise facts in detail are set forth in the opinion of the court below along with the admission of the defendant and his so-called explanation, as to which the court remarks that "no credence can be given the highly improbable story of the accused" (pp. 11, 12).

There is no doubt that he falsified the document; that a false entry in the cashbook was proved. "It is evident that there has been a falsification; that that falsification was committed in the entries made under date of June 22, 1904, in the aforesaid cashbook * * * in relation to the pay rolls corresponding to Nos. 29 and 30 of the light-houses at Capul and Mala-brigo" (p. 6). And the appellate court, referring to the book as an official book and not a mere personal notebook or memorandum, says "the book in which the falsifications were proven to have been made" (p. 13).

The Accused was a Public Official, and the Document a Public or Official Document.

1. Chapter IV of Title IV of the Philippine Penal Code is entitled "Falsification of Documents." Section 1 is under the subheading "Falsification of

Official and Commercial Documents and Telegraphic Dispatches." Article 300 of the code under that heading provides:

The penalties of cadena temporal [12 years and 1 day to 20 years' imprisonment; art. 96 of code] and a fine of from 1,250 to 12,500 pesetas shall be imposed on a public official who, taking advantage of his authority, shall commit a falsification—

* * * * *

4. By perverting the truth in the narration of facts.

Article 401 under a later title provides that:

For the purposes of this and of the preceding titles of this book, every person shall be considered a public official who, by the immediate provisions of law or by popular election or appointment by competent authority, takes part in the exercise of public functions.

It is a presumption of Philippine law, as of law generally, that one exercising an office has been appointed by competent authority (sec. 334, subsection 13, Code of Civil Procedure; 1 Philippine Laws, 430), and the accused admits that at the time the offense was committed he was in the exercise of the duties of that office. According to that provision of the Code of Civil Procedure, it is a satisfactory although disputable presumption "that a person acting in a public office was regularly appointed or elected to it," and the defense did not prove, nor undertake to prove, that the accused had not been appointed by competent authority.

The light-house service in the Philippines is specifically committed to the Philippine government by the organic act (sec. 11; 32 Stat., at p. 695), with the authority "to adopt and enforce regulations in regard thereto." The first Philippine act on the subject created the bureau and the office of disbursing officer thereof (No. 266, October 17, 1901; 1 Phil. Laws, 664), provided for the organization of the service, for cooperation with other branches of the public service, and for the union, in effect, of the bureau with the office of captain of the port. The effect of the authority of the organic act was to validate and confirm this previous exercise of authority by the temporary and provisional government, and numerous later appropriation acts are to be regarded as reenacting the original Philippine law and connecting the entire scheme integrally with the grant of authority from Congress (e. g., act No. 807 July 27, 1903, 2 Phil. Laws, at p. 502; act No. 1049, Feb. 11, 1904, 3 Phil. Laws, at p. 222).

The defendant, therefore, was a regular official in the permanent service of the government of the islands. He was the disbursing officer of the bureau of coast guard and transportation. The office which he held was regularly created and appropriated for by law. It appears that the office of captain of the port of Manila was consolidated with and brought under that bureau, and that the book in question was the cash book of the captain of the port, which was continued in use after the consolidation (6, 13). The bureau, as embracing the light-house service, and the post

which the defendant held, were constituted and established by competent authority of law.

This case, therefore, is not subject to the criticism of *Carrington v. United States* (208 U. S., 1), wherein it was held that an officer of the United States army receiving from civil sources—that is, from the island government—a certain sum of money to be used by him in connection with his military command, in the performance of his duties incident to that command, did not hold a civil office, which commonly requires something more permanent than a single transitory act or transaction to call it into being. The ground of that decision was that—

The plaintiff in error was performing no public function of the civil government of the Philippines; he was performing military functions to which the civil government contributed a little money. As a soldier he was not an official of the Philippines, but of the United States.

The *ratio decidendi* of that case is not present here.

2. Article 299 of the Code of Civil Procedure is as follows:

Public writings.—The written acts or record of the acts of the sovereign authority, of official bodies and tribunals and of public officers, legislative, judicial, and executive of the Philippine Islands, or of the United States, or of any States of the United States or of a foreign country, and public records kept in the Philippine Islands [of] private writings are public writings. (1 Phil. Laws, 378, 424-425.)

It was proved as a fact in the case that—

In the performance of his duty as disbursing officer of the Bureau of Coast Guard and Transportation the principal book kept by the accused was the official cash book of the bureau, which had been opened when that book was known as the cash book of the captain of the port, and continued in use when the office of captain of the port was consolidated with and brought under the Bureau of Coast Guard and Transportation (p. 13).

Construing Philippine laws which relate to the accounts and reports of disbursing and other officers and prescribe the method of keeping and rendering accounts and the liability of the insular treasurer and of all collecting, disbursing, and accounting officers in respect to the same, it was held by the court below that the cashbook described in the complaint was the record which the accused was required to keep under the express provisions of these laws (sec. 2, act No. 12, Oct. 3, 1900, 1 Phil. Laws, 12; sec. 1, act No. 36, Oct. 29, 1900, 1 Phil. Laws, 37), and in this connection it was held that a later act giving the insular auditor authority merely to prescribe forms for keeping and rendering accounts did not affect the above-cited previous provisions of law, and did not authorize the auditor to dispense with the keeping of records by disbursing officers, which, as matter of fact, the auditor did not undertake to do.

It can not be doubted that under this definition and these rules the cashbook was an official and public document within the meaning of the Penal Code.

A few other comments on this record will be proper; the sentence imposed was *cadena* in the medium degree, or simple imprisonment for fifteen years (art. 96 of code *ut sup.*; see also arts. 25, 28), with the accessory civil disabilities of article 56 and a fine of 4,000 pesetas, or about \$800 gold. The sentence in the Paraiso case, *ante* (see p. 7, record therein, No. 23, Oct. term, 1907), for a similar offense under the same law was substantially the same.

The judge in first instance very properly emphasized the nature of this offense as a matter of grave public concern under the old Spanish law, referring to a decision of the supreme court of Spain that "in an official or public document it is first endeavored to protect the interest of society by the most strict faithfulness on the part of the public official in the administration of the office entrusted to him; it being immaterial whether or not the falsification caused damage to a third party" (rec., p. 8). The code in article 300 says nothing whatever of loss or damage to the state, or of intent, whereas in articles 304, 305, under "Falsification of Private Documents" the law expressly contemplates "the prejudice of a third person" and the "intent of gain." The court of first instance, however, says that "there was plenty of evidence in the trial to make apparent the evil intention of the accused, Paul A. Weems, in all his actions" (rec., p. 9).

We therefore have nothing to do with an actual embezzlement, or a penitential purpose and endeavor

by the accused afterwards to make up the actual deficiency. But if we were at liberty to consider that claim, we should find that while there appears to have been a short payment on pay roll No. 30 of 204 pesos, where 408 pesos were due and entered in the cash-book, and no payment at all on No. 29, where 204 pesos were falsely entered (Rec., pp. 2, 11); and while apparently, although it is not clear, the salaries falsely entered as paid in June, 1904, were actually paid the following September (p. 6), the appellate court sets forth the defendant's confession and avoidance and the evidence opposed to it and refers to his story as highly improbable, and for that reason excludes as unnecessary consideration of testimony of acts by him amounting to an acknowledgment of criminality (pp. 11, 12; see also top p. 9). But if all these circumstances were relevant and were duly weighed and considered as on a charge of embezzlement, it is to be observed that such an attempt to retrace the steps taken usually occurs in embezzlements, and that the definitive crime has been none the less committed because two or three months later it is sought to return or make up the stolen money.

This defendant's crime was much more serious than that of Paraiso. When all the circumstances and relations are taken into consideration Weems might justly be held to a more weighty responsibility than Paraiso, and the nature and consequences of what Weems did were more injurious to the State and the community than Paraiso's acts. The deterrent effect

of punishment is quite as important to be considered in this case as in that. It is at least as important, then, to maintain this conviction and sentence as that, and I respectfully submit that the judgment of the Supreme Court of the Philippine Islands should be affirmed.

HENRY M. HOYT,
Solicitor-General.

MARCH 27, 1909.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

PAUL A. WEEMS, PLAINTIFF IN ERROR, }
v. } No. 20.
THE UNITED STATES. }

*IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE
ISLANDS.*

REPLY BRIEF ON BEHALF OF THE UNITED STATES.

I.

This cause should be dismissed for the want of jurisdiction in this court to hear and determine the same.

By section 10 of the act of July 1, 1902 (32 Stat., 695), this court is given power to review final judgments of the Supreme Court of the Philippine Islands in all cases "in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved," and causes in which the value of the matter involved exceeds \$25,000.

Neither of the two questions principally considered in both the Court of First Instance and the Supreme Court of the Philippine Islands, to wit, whether plaintiff in error was a public official

within the meaning of section 300 of the Penal Code, and whether the book in which the false entries appeared was a public record, can be considered as falling within either of the classes mentioned in said statute.

The other four questions now relied upon are, first, that the Government by which Weems was employed is not properly described in the complaint; second, that the record fails to show that plaintiff in error was formally arraigned and interposed a plea; third, that the record does not show that plaintiff in error was present when he was tried; and, fourth, that the punishment inflicted by the sentence is cruel and unusual.

The second of these questions has been eliminated by filing a more perfect record of the proceedings of the court below, which was sent up in response to a writ of certiorari issued by order of this court at the last term. Defendant was regularly arraigned and pleaded not guilty, and such fact is shown by the record. (Writ of Certiorari and Return, pp. 9, 10.)

The Government insists that neither of these questions confers jurisdiction upon this court for the following reasons:

First. *No constitutional question is here involved.*

The Constitution does not extend to the Philippine Islands (*Dorr v. United States*, 195 U. S., 138), and plaintiff in error does not claim that he has any constitutional right which has been violated.

Second. No statute, right, or privilege of the United States is here involved, within the meaning of said act.

Certainly the *validity* of no statute, treaty, title, right, or privilege of the United States is here involved; and if the meaning of this statute is the same as that which provides for appeals from the Court of Appeals of the District of Columbia, it must be the *validity* and not the construction of an act, etc., which is involved.

Balt. & Pot. R. R. Co. v. Hopkins, 130 U. S., 210, 226.

United States v. Lynch, 137 U. S., 280, 285.

South Carolina v. Seymour, 153 U. S., 353, 360.

Again, at best the questions raised involve only the *sufficiency* of the complaint and of the record of the proceedings, which does not give jurisdiction to this court.

Cornell v. Green, 163 U. S., 77.

Paraiso v. United States, 207 U. S., 368, 370.

Third. Neither of the last three questions can give jurisdiction, because they are all presented for the first time in the brief filed by counsel for plaintiff in error in this court.

There is not a suggestion in the record that either of these questions was in any way mentioned in either the Court of First Instance or the Supreme Court of the Philippine Islands. The principle that in order to give jurisdiction to this court the jurisdictional question must be raised in the court below was

expressly held to apply to cases brought to this court from the Supreme Court of the Philippine Islands in *Paraiso v. United States* (207 U. S., 368, 370).

In *Crain v. United States* (162 U. S., 625) it was held that it is essential for the record to show that the defendant was arraigned and pleaded; and on account of the deficiency of the record in that respect the case was reversed, notwithstanding the fact that the question had not been raised in the court below. *But in that case the jurisdiction of the court did not depend upon that question.* We confidently assert that in all the long line of cases in which the jurisdiction of this court has been called in question, in not one has it been held that this court will take jurisdiction by virtue of a question not mentioned in the court below, but raised here for the first time. The following are cited in which the contrary has been held, and we have been unable to find any case in conflict with them:

Lawler v. Walker, 14 How., 149, 152.

Spies v. Illinois, 123 U. S., 131, 181.

Brooks v. Missouri, 124 U. S., 394.

Morrison v. Watson, 154 U. S., 111, 115.

Winona, etc., Land Co. v. Minnesota, 159 U. S., 540.

Oxley Stave Co. v. Butler Co., 166 U. S., 648, 658.

Citizens Savings Bank v. Owensboro, 173 U. S., 636, 643.

Home for Incurables v. New York, 187 U. S., 155, 157.

Johnson v. Insurance Co., 187 U. S., 491, 495.

Chicago Ry. Co. v. McGuire, 196 U. S., 128.
Hurlbert v. Chicago, 202 U. S., 275.
Osborne v. Clark, 204 U. S., 565.
Serra v. Mortiga, 204 U. S., 470.
Arkansas v. Schlierholz, 179 U. S., 598.
Carey v. Houston, etc., Ry. Co., 150 U. S.,
170, 181.
Ansbro v. United States, 159 U. S., 695.
Cornell v. Green, 163 U. S., 75, 78.
Cincinnati, etc., Ry. Co. v. Thiebaud, 177
U. S., 615, 620.

II.

The court below did not err in overruling the demurrer to the complaint.

The sole ground of criticism is that in the complaint plaintiff in error's official position is described as "disbursing officer of the bureau of coast guard and transportation of the United States Government of the Philippine Islands," when it is said the words "United States" should have been omitted, and the description should have been "disbursing officer of the bureau of coast guard and transportation of the government of the Philippine Islands."

The only purpose of this description was to give plaintiff in error reasonable notice of the offense with which he was charged. It is not insisted that there are two positions, one answering the description given in the complaint and the other the description insisted upon as correct. The criticism is that the description given is not quite correct. The public

document which he is alleged to have falsified is described as—

a cashbook of the captain of the port of Manila, Philippine Islands, and the bureau of coast guard and transportation of the United States Government of the Philippine Islands, kept by the said Paul A. Weems, as disbursing officer of the said bureau of coast guard and transportation.

There is but one government of the Philippine Islands, and that was established by the United States, and is in fact the United States Government of the Philippine Islands; and there is but one "port of Manila, Philippine Islands," and but one captain of that port, and it is not questioned in any way that plaintiff in error kept that book. It is frivolous to pretend that these descriptions did not fully and clearly inform plaintiff in error of the particular book which he was charged with falsifying, and when taken in connection with the other allegations in the complaint did not give him notice of the precise false entries which he was accused of making.

The language used by this court in *Paraiso v. United States* (207 U. S., 368, 372), to wit:

The bill of rights for the Philippines giving the accused the right to demand the nature and cause of the accusation against him, does not fasten forever upon those islands the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpretation capa-

ble of occurring to intelligence fired with a desire to pervert—

is especially pertinent to this case.

The Supreme Court of the Philippine Islands treated the question as one having no merit, its entire discussion of this question being as follows:

It is sufficient answer therefore to the first assignment of error to point out that the bureau of coast guard and transportation of the *Philippine government* is sufficiently described as the bureau of coast guard and transportation of the Government of the United States *in the Philippine Islands*, because the Philippine government is, in fact, the Government of the United States in the Philippine Islands. The alleged defect in the complaint could not "prejudice any substantial right of the defendant upon the merits," as the language used left no room for doubt as to the bureau which it was intended to designate.

General Order No. 58 amending the Criminal Code of Procedure (Pub. Laws Phil. Com., vol. 1, pp. 1082-1083), provides that a complaint *is sufficient* if it shows—

the acts or omission complained of as constituting the crime or public offense in ordinary and concise language, without repetition, not necessarily in the words of the statute, *but in such form as to enable a person of common understanding to know what is intended and the court to pronounce judgment according to right* (sec. 6, par. 3);

and that,

When an offense shall have been described with sufficient certainty to identify the act, an erroneous allegation as to the person injured shall be deemed immaterial (sec. 7);

and again that,

No information or complaint is insufficient nor can the trial, judgment, or other proceeding be affected by reason of a defect in matter of form which does not tend to prejudice a substantial right of the defendant upon the merits (sec. 10).

The case of *Carrington v. United States* (208 U. S., 1), cited by counsel, has no bearing upon this question. Carrington was prosecuted for committing an offense as a civil officer when he was in fact acting at the time as a military officer, and had not, therefore, committed any offense under the statute.

III.

The questions presented here for the first time should be treated as waived by plaintiff in error.

It is true that in *Crain v. United States, supra*, the fact that it was not shown by the record that plaintiff in error had been arraigned and had pleaded, was not treated as waived by reason of the fact that the question was first raised in this court. But we insist that the present case should not be controlled by the Crain case, for the following reasons:

(1) The question presented in the Crain case, that the record must show that the accused was arraigned and interposed a plea, as heretofore shown, does not arise in this case.

(2) This case has passed through one appellate court, where every opportunity was given plaintiff in error to present these questions by assignment of errors, which was not true in the Crain case.

(3) The rules governing the procedure in criminal trials are set forth in the acts of the Philippine Commission, sections 3270-3273, and the rights and duties of a defendant in reference to being arraigned and interposing a plea, and being present at the trial, is governed thereby; and it is the peculiar duty of the courts of the Philippine Islands, and not of this court, to interpret and enforce said provisions. Therefore, when a question relating thereto has never been presented to either of said courts, and no opportunity given them to pass upon said question, it can not be said that any error was committed by them or either of them with reference thereto, and this court should not assume jurisdiction to pass upon the same.

(4) In *Trono v. United States* (199 U. S., 521, 533), it was held that when a defendant appeals from a judgment of a Court of First Instance to the Supreme Court of the Philippine Islands, he thereby waives his right to rely upon the former jeopardy, and may by said court be convicted of an offense for which he was acquitted on the first trial. It would be difficult to find a reason for holding that this statutory right is waived by an appeal, but that a failure in two courts to rely upon the questions here raised for the first time does not constitute a waiver of those questions.

IV.

There is no merit in the contention that the case should be reversed because the record fails to show that plaintiff in error was present when the trial was had.

(1) From the decision of the Supreme Court of the Philippine Islands (Rec., p. 12), it appears that plaintiff in error gave his testimony, and he must therefore have been present.

(2) There is no statute or rule of procedure which required his presence at the trial. In *Hopt v. United States* (110 U. S., 574), cited by counsel, wherein a new trial was awarded because an examination of some of the jurors was had out of the presence of the defendant, although no objection was made at the time, the trial court was proceeding under a statute which provided that "if the indictment is for a felony, the defendant *must be personally present at the trial*," and it was held that the examination of the jurors was a part of the trial.

(3) The record shows a sentence duly pronounced (Rec., p. 9), and this court will not presume that a fatal defect existed which is not affirmatively shown by the record. Especially is this true when the claim of irregularity is made here for the first time.

V.

The punishment imposed is not cruel or unusual within the meaning of the Philippine Bill of Rights.

The Philippine courts are guided in fixing the amount of a penalty by the circumstances attending the offense, whether extenuating or aggravating. Section 81 of the Penal Code provides that where

there are neither aggravating nor extenuating circumstances attending the deed, the penalty prescribed by law shall be imposed in its minimum degree; where there is an extenuating circumstance, the minimum degree must be imposed; and where there is an aggravating circumstance, the maximum degree must be imposed. In the present case the trial court ruled that (Rec., p. 9)—

no circumstances modifying the responsibility is to be taken into consideration in the commission of the crime at bar, for which reason the penalty corresponding to the medium degree should be applied to the accused.

The fine imposed is a moderate one.

There is nothing cruel or unusual in a long term of imprisonment, as the words are used in the Bill of Rights. The description there refers rather to mutilations and degradations, and not to length or duration of the punishment. The penalty of *cadena temporal*, which article 300 prescribes for this class of offenses, includes a term of imprisonment ranging from twelve years and one day to twenty years (articles 28, 96, Penal Code), and the sentence of fifteen years imposed here is therefore well within the law.

This court has not passed upon the meaning of the words "cruel and unusual punishment." In *Wilker-son v. Utah* (99 U. S., 130), Mr. Justice Clifford, who delivered the opinion of the court, said, referring to Blackstone:

Difficulty would attend the effort to define with exactness the extent of the constitutional

provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.

These words were quoted by the Chief Justice of this court in the case of *In re Kemmler* (136 U. S., 436), where it was held that the punishment of death by electricity is not cruel within the meaning of the constitutional prohibition.

While the state courts are not entirely in accord as to the meaning of the term, the majority of the cases hold that the words employed in the Constitution signify such punishment as would amount to torture, or which is so cruel as to shock the conscience and reason of men; that something inhuman and barbarous is implied.

State v. Williams, 88 Mo., 310.

Miller v. State, 49 N. E., 894.

Hobbs v. State, 32 N. E., 1019.

In re Bayard, 25 Hun., 546.

State v. Becker, 51 N. W., 1018.

Territory v. Ketchum, 65 Pac., 169.

People v. Morris, 45 N. W., 591.

In *O'Neil v. Vermont* (144 U. S., 323, 331) the court quoted, certainly without disapproval, the opinion of the Supreme Court of Vermont sustaining a very large fine in the aggregate and a very long term of imprisonment in addition as not violating the constitutional guaranties.

If the punishment in this case seems excessive compared with the offense, it is for the Philippine legislative power or for Congress to change the law.

It is insisted, therefore, first, that the cause should be dismissed for the want of jurisdiction; and, second, that if jurisdiction be assumed, the judgment of the court below should be affirmed.

J. A. FOWLER,
Assistant Attorney-General.

OCTOBER, 1909.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

PAUL A. WEEMS, PLAINTIFF IN ERROR, }
v. } No. 20.
THE UNITED STATES. }

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE
ISLANDS.

SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

The three questions now relied upon by plaintiff in error are:

1. That the offense with which plaintiff in error is charged is not sufficiently described in the complaint, because he is described as "Disbursing officer of the bureau of coast guard and transportation of the *United States* government of the Philippine Islands," when, it is insisted, the words "United States" should be eliminated and the government should be described as the "government of the Philippine Islands."

2. That the record fails to show that plaintiff in error was present when tried, or that he was in court at any time during the trial.
3. That the punishment of fifteen years' imprisonment is a cruel and unusual punishment.

We will consider together both the question of jurisdiction arising out of each question, and the merit of the same, in the order mentioned.

I.

The first question presented does not authorize an appeal from the judgment of the Supreme Court of the Philippine Islands to this court, because,—

(1) It involves only the sufficiency of the complaint when construed in relation to section 6, paragraph 3, and sections 7 and 10 of General Order No. 58, amending the Criminal Code of Procedure (Pub. Laws, Phil. Com., vol. 1, pp. 1082-1083), which specify when a complaint in a criminal proceeding is sufficient in its allegations and does not involve the "Constitution or any statute, treaty, title, right, or privilege" of the United States.

(2) The question, it is respectfully submitted, is too frivolous to require the serious consideration of this court.

A discussion of the merits of this question may be found on pages 5 to 8 of the original brief.

II.

The second question, to wit, that the record fails to show that plaintiff in error was present at any time during the trial, does not give jurisdiction to this court, and, moreover, does not constitute a reversible error.

First. Said question does not afford ground for jurisdiction, because,

(a) It was not raised in either the Court of First Instance or in the Supreme Court of the Philippine Islands. The assignment of errors filed in the Supreme Court of the Philippine Islands is found on page 15 of the record filed October 14, 1907, and the assignment of errors filed in this court is found on pages 19 and 20 of said record, and in neither of said assignments is this question mentioned; and it appears for the first time in plaintiff in error's brief filed in this court at the October term, 1908.

For authorities that this court will not take jurisdiction of a case to determine a question which was presented for the first time in this court, see cases cited on pages 4 and 5 of the former brief.

Decisions in cases removed from state courts are cited by plaintiff in error to the effect that, if it can be gathered from the record that the Federal question involved was passed upon by a state court, the writ of error will not be dismissed, even though the record does not show affirmatively that the question was presented to or considered by that court. This principle has often been recognized, but it has been uniformly held that the record must be in such condition that it was necessary for the Federal question

to have been involved in the decision of the state court. The last case of that nature is *Smithsonian Institution v. St. John* (214 U. S., 19, 28), wherein the court quoted from the opinion in *Rogers v. Alabama* (192 U. S., 226, 230):

It is a necessary and well-settled rule that the exercise of jurisdiction by this court to protect constitutional rights can not be declined *when it is plain that the fair result of a decision is to deny the rights.*

In that case it appeared that full faith and credit were not given by the court of one State to the constitution of another State, and that such question was necessarily involved in the decision of the case.

Plaintiff in error cites the case of *Crain v. United States* (162 U. S., 625) as authority in support of his contention that this court will consider this question, though not presented to or in any wise considered by the court below. In response to this insistence, the fact is emphasized that *the jurisdiction of the court in that case did not depend upon the question whether Crain was arraigned and pleaded*; and the numerous cases cited on pages 4 and 5 of the original brief, in which jurisdiction was denied because the question relied upon was not raised in the court below, are again called to the attention of the court.

It was suggested by counsel for plaintiff in error in argument that this and the third question are specifically raised by assignment of errors filed in this court. It is true that on page 5 of plaintiff in error's

brief filed at the last term of court there appears what purports to be an assignment of errors in which these grounds are set forth. But this is not an assignment of errors within the meaning of the rules of this court. Section 997, Revised Statutes, requires that the assignment of errors for this court must be filed in the court below, and rule 21, section 4, provides that errors not specified according to this rule will be disregarded, but that the court, at its option, may notice a plain error not assigned or specified. Clearly, therefore, a question which does not appear in the assignment of errors required by the statute can not be regarded as properly assigned, because in the printed argument it is designated as an assignment of error. Even if the rules of this court permitted counsel, on application, to assign additional errors, these questions would not fall within the rule, because there is no order of the court showing that any such application was made or any permission granted to plaintiff in error to assign such additional errors. Consequently, the record in this case is in precisely the same condition as that in the case of *Paraiso v. United States* (207 U. S., 368, 370), in that the questions have been mentioned in argument, but have never been raised in the assignment of errors in any court.

(b) This question does not involve the consideration of a statute, right, title, or privilege of the United States.

This will more fully appear from a discussion of the question upon its 'merits.

Second. *The fact that the record fails to show that plaintiff in error was present during the trial is not a valid ground for reversal of the judgment against plaintiff in error.*

A careful examination fails to disclose any specific language, either by the military authorities when occupying the Philippine Islands, or by the Philippine Commission, or by act of Congress, whereby the criminal laws existing there before their cession to the United States were adopted. Furthermore, nothing was said upon this subject in the treaty between the United States and the Government of Spain by which the cession was made. But it is a well-recognized principle that where the treaty is silent upon this subject the previous laws of the acquired territory continue in force until changed by the proper authorities of the government acquiring it.

American Insurance Co. v. 356 Bales of Cotton, 1 Pet., 511, 543.

Leitensdorfer v. Webb, 20 How., 176, 177.

More v. Steinbach, 127 U. S., 70, 81.

In the instructions to the Philippine Commission dated April 7, 1900, President McKinley gave them express charge that—

The main body of the laws which regulate the rights and obligations of the people should be maintained with as little interference as possible. Changes made should be mainly in procedure and in the criminal laws to secure speedy and impartial trials and at the same time effective administration and respect for

individual rights. (Compilation of Acts, Philippine Com., p. 14.)

And in the first section of the act of Congress of July 1, 1902, it was provided that "the action of the President of the United States in creating the Philippine Commission and authorizing said commission to exercise the powers of government to the extent and in the manner and form, subject to the regulation and control set forth in the instructions of the President to the Philippine Commission dated September 7, 1900, * * * is hereby approved, ratified, and confirmed, and until otherwise provided by law the said islands shall continue to be governed as thereby and herein provided."

It is clear, therefore, that the procedure in criminal cases is precisely as it was before the cession, except in so far as it has been modified by the orders of the military authorities before the appointment of the Philippine Commission, by acts of said Commission, and by acts of Congress. What the method of procedure was in criminal cases with reference to the pronouncing of judgments against defendants is stated by the Supreme Court of the Philippine Islands in *United States v. Baluyut* (5 Phil. Rep., 129, 132), where it is said:

Under the Spanish law of criminal procedure in force prior to the American occupation the judgment of the court was always in writing. It contained a statement of the facts which appeared from the evidence, the conclusions of law which the judge drew from those facts,

and the penalty imposed upon the defendant. These all were contained in one document. There were not two documents or two proceedings, one corresponding to the verdict rendered by the jury in the criminal procedure in the United States and the other corresponding to the imposition of the penalty, by the judge. According to the former procedure it was not necessary that either the judge or the prisoner should be present in court when the judgment was entered. It was sufficient that the judgment, signed by the judge, was filed in the court and afterwards read to the prisoner.

Nor does it anywhere appear that under the laws then existing there was any necessity that the defendant should be present at any time during the trial of the case.

It is now contended by plaintiff in error that this rule of practice was so modified by that clause of the act of July 1, 1902, which provides "That no person shall be held to answer for a criminal offense without due process of law" (Compilation of Acts, Phil. Com., p. 23), as to require the presence of the accused during the trial. In support of this proposition he cites in his supplemental brief numerous cases wherein it was held that it is a fatal error for any material step in the proceedings in a felony case in the trial court to be taken in the absence of the defendant, and in some jurisdictions that the failure of the record to show affirmatively the pres-

ence of the defendant when every such step was taken will warrant a reversal.

A careful consideration of these authorities will show that they constitute no precedent in this case, because they were based upon the common or statutory laws, which have never been in force in the Philippine Islands, and in no case decided by a state court was it intimated that the presence of the defendant was required in order that the conviction might be had by due process of law. For illustration, *State v. Jones* (61 Mo., 232, 235), sec. 1103 Wagn. Stats., as well as previous Missouri cases, were cited as authority, which shows that the decisions were based primarily upon a Missouri statute. In *Harris v. People* (130 Ill., 457, 459), it was said:

It has been a well-established rule of the *common law* from an early period that a prisoner accused of a felony must be arraigned in person and must plead in person, and his personal appearance is required throughout the trial, and at the time sentence is pronounced, citing for authority 1 Chitty Crim. Law, 414 and 1 Bishop Crim. Proced., 275; *Eliza v. State* (39 Ala., 693, 697), wherein it is said:

The rule is well settled in *England* and in this State, and is inflexible, that a prisoner accused of felony must be arraigned in person and must plead in person; and in all the subsequent proceedings it is required that he shall appear in person;

Shelton v. Commonwealth (89 Va., 453, 454), wherein it was said:

It is an established rule that a person indicted for a felony must not only be arraigned in person and plead in person, but he must be personally present during all the subsequent proceedings, and the record must show that he was present; nor can he waive the right to be present. *The rule was established at an early day in England*, at a time when a person on trial for felony was not allowed the advice and assistance of counsel; and although the reason for the rule (to the extent, at least, that the accused was never denied the right to have the aid of counsel) does not exist in this country nor at the present day in England, yet the rule still prevails *in Virginia* in all its ancient strictness;

Cole v. State (10 Ark., 318, 324), where the decision rested upon a statute which provided that no indictment for a felony should be tried unless the defendant be present in person during the trial, as well as upon general authorities; and in *Warrace v. State* (27 Fla., 362, 366), which appears to be the leading Florida case on this subject, where the decision rested upon the authority of 1 Bishop Crim. Proced. (secs. 268-272).

Plaintiff in error, however, especially relies upon the decision of this court in *Hopt v. Utah* (110 U. S., 574, 579), wherein it appeared that the triers appointed by the court to pass upon the competency of certain jurors, did so in the absence of the accused,

and this court held that such conduct was a fatal error, and that the right to be present at such step in the proceedings could not be waived by the accused. The statute of Utah, however, under which the case was being tried, expressly provided that one indicted for a felony "*must* be personally present at the trial," and it was held that the proceeding mentioned was a part of the trial. Plaintiff in error, on pages 5 and 6 of his brief, quotes a lengthy extract from the opinion of the court in that case, which clearly shows that the decision rested entirely upon the statute. It is true, however, that in the closing sentence it was said:

If he be deprived of his life or liberty without being so present, such deprivation would be *without that due process of law required by the Constitution*;

but it is clear from the context that what the court meant by this statement was, that inasmuch as the legislative body had specifically provided for a certain mode of procedure, the procedure thus adopted was *due process of law*, and that the conviction of one without a compliance with this procedure would not be a conviction by due process of law. It was suggested in argument that the citation of this case in *Crain v. United States* (162 U. S., 625), indicated that the court rested its decision upon the due-process-of-law clause of the Constitution; but, in fact, the connection in which it was cited (p. 644) shows the contrary. Subsequently (p. 645) the court said that the Constitution "does not forbid the deprivation of liberty without

due process of law; and due process of law requires that the accused plead or be ordered to plead, or, in a proper case, that a plea of not guilty be filed for him, before his trial can rightfully proceed;" but the *Hopt* case was not cited as having any bearing upon this proposition.

It certainly does not follow that, because the presence of the accused in his trial for a felony was required by the common law, the presence of one so accused is made imperative by the due process clause in the Constitutions of the United States and of the several States, and of the Philippine Bill of Rights. If such were the fact, then every common-law rule of procedure in criminal and, indeed, in civil cases was, by the Fourteenth Amendment, engrafted into the Constitution of the United States and there made a rule of procedure in all the States, and there could be no modification of those rules by state legislation.

The general meaning of this term is defined probably with as much clearness as anywhere by this court in *Hurtado v. California* (110 U. S., 535), in the following language:

Due process of law in the latter (the fifth amendment) refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the fourteenth amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority

from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure.

"The fourteenth amendment" (as was said by Mr. Justice Bradley in *Missouri v. Lewis*, 101 U. S., 22-31) "does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial procedure."

It has even been held that due process of law does not in all cases require a resort to a court of justice. *Davidson v. New Orleans* (96 U. S., 97), *Public Clearing House v. Coque* (194 U. S., 486, 508). And, in *Paraiso v. United States*, *supra*, in speaking about the sufficiency of the complaint against the accused, this court said:

The Bill of Rights for the Philippines, giving the accused the right to demand the nature and cause of the accusation against him, *does not fasten forever upon those islands the inability of the seventeenth-century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert* (p. 372).

The Supreme Court of the Philippine Islands considered this very question in *United States v. Baluyut, supra*, and held that it was not governed by the due process clause, in the following language:

It is doubtless true by the common law in force in America that the defendant in a case of felony must be present at all stages of the proceedings. If the legislature of a State whose constitution contained provisions similar to those contained in said section 5 should pass a law saying distinctly that the prisoner in a case of felony should not be entitled to be present upon the hearing of a demurrer or a motion for a new trial or when the verdict of the jury was pronounced, or when the penalty was declared by the judge, would such legislation be constitutional? The right of the prisoner to be present at any one of these stages is not in terms secured by any one of the provisions contained in said section 5, and the right to be so present does not seem to be an essential ingredient of that due process of law which is guaranteed by said constitutional and statutory provisions. (5 Phil. Rep., p. 133.)

In many respects the proceedings in criminal cases in the Courts of First Instance are novel to an American lawyer. For instance, if the court be satisfied that a material witness for the government will not attend the trial, and such witness can not give bail, his deposition may be taken on notice (Gen. Order No. 58, sec. 62), and the trial is had before the court without the intervention of a jury, and very nearly therefore conforms to the trial of a case at law wherein

the jury has been waived. Such trials have been recognized as valid in the several criminal cases which this court has had before it for review, notwithstanding the due process clause and the clause giving the accused the right to confront the opposing witnesses, found in the Philippine Bill of Rights.

It is obvious that the presence of the accused at such a proceeding is not so important as at a jury trial conducted as they are in the courts of the United States. Chief Justice Gibson assigned as a reason why the defendant should not be allowed to waive his presence that it was against the dictates of humanity to let a prisoner "waive that advantage which a view of his sad plight might give him, by inclining the hearts of the jurors to listen to his defense with indulgence." (*Prine v. Commonwealth*, 18 Pa., 103, 106.) And the rule requiring his presence rested at common law upon the anxiety that every advantage, both legal and sentimental, should be given the prisoner. Since the jury is thus dispensed with, the advantage of the accused's presence can be but slight.

Again, if the right to be present at the trial were embraced in the due process clause, the objection which might have legitimately been made, was waived by failure to raise the question either in the Court of First Instance or in the Supreme Court of the Philippine Islands. It is proper to so hold, in order that there may be a uniformity of decision in construing and enforcing the Philippine Bill of Rights. *In Trono v. United States* (199 U. S., 521),

it was held that the right secured by the clause that "no person for the same offense shall be put twice in jeopardy of punishment," was waived by the taking of an appeal by an accused from a judgment in which he had been acquitted of a higher offense and convicted of a lower. And in *United States v. Anatasio* (6 Phil. Rep., 413), it was held that the right "to meet the witnesses face to face" could be waived by the defendant.

While there is error in the record, yet it is not such an error as can be relied upon in this court; and in any event, it would only justify the court in remanding the case with directions for a proper judgment to be pronounced.

By section 41, General Order No. 58 (Compilation of Acts of Phil. Com., sec. 3296), it was provided that "the defendant must be personally present at the time of pronouncing judgment, if the conviction is for a felony." And, in *United States v. Karelson* (3 Phil. Rep., 223, 241, 242), it was held that:

The requirement of the law that the accused be present personally at the time of pronouncing judgment if convicted of a felony is mandatory, and in case of a failure to comply therewith the sentence will be reversed, without disturbing the verdict, and the cause remanded with instructions to the court below to pronounce judgment in accordance with the provisions of the statute.

The court in this case went too far in saying that "The court, in case of felony, must insist upon the

presence of the accused in court *during every step in the trial*" (p. 231), and in citing *Hopt v. Utah, supra*, in support of that position. The statute under consideration in the *Hopt* case required the presence of the defendant *during the entire trial*, while order No. 58 required his presence *only when judgment was pronounced*. That the practice was modified in this respect only to the extent of the exact language used in the order, was expressly held in the subsequent case of *United States v. Baluyut, supra*, wherein it was held that it was not necessary for the judge to be present when the judgment was published.

But the court in the *Karelsen* case held that the proceedings below were invalid only so far as they had been had contrary to the law, and therefore did not disturb the verdict, but remanded the case that proper judgment should be rendered; and, since Order No. 58 did not require the presence of the defendant except when judgment was pronounced, then it is the judgment alone that is invalid.

But in any event the absence of the accused, if he was absent, was in violation of an order of the government of the Philippine Islands, and not of a statute, right, or privilege of the United States, and therefore it was a question which should have been addressed to the Supreme Court of that government, and one over which this court has no jurisdiction.

III.

The third ground relied upon, that the punishment inflicted upon plaintiff in error is cruel and unusual, does not afford ground for jurisdiction, nor is the punishment cruel and unusual within the meaning of that expression as used in the act of July 1, 1902.

1. *This question does not give ground for jurisdiction, because it was for the first time mentioned in plaintiff in error's brief filed at the last term of this court.*

The case of *Paraiso v. United States* (207 U. S., 368, 370), unless overruled, is conclusive of this proposition. In that case Paraiso was indicted, convicted, and sentenced under the same statute which is here complained of, and the question of cruel and unusual punishment was raised in argument and not assigned as error, the court stating that there was no suggestion in the record that any of the questions then relied upon were raised at any stage of the proceedings in the courts below. The court cited for authority a number of cases coming to this court from the United States Circuit Courts, of which the court refused to entertain jurisdiction because the records failed to show that the questions were raised for the consideration of the courts below, and then said:

Our consideration of the case properly might stop here, but as the rule laid down was probably not well known, we will add that we find nothing in the errors assigned, and the court did consider the complaint and held that it was sufficient.

2. *The sentence imposed is not a cruel and unusual punishment within the meaning of that expression as used in the act of July 1, 1903, nor are the provisions of the Philippine Criminal Code, under which the sentence was pronounced, in contravention of the provisions of said act.*

This law was one existing in the Philippine Islands at the time of their cession to the United States, and as above shown, the Philippine Commission was charged by the President to maintain the body of laws which regulated the rights and obligations of the people, with as little change as expedient, and although this law has been enforced by the courts ever since the Philippines became territory of the United States, yet the Philippine Commission has not deemed it proper to modify this provision in any respect, notwithstanding the fact that they have enacted a very extensive criminal code which defines and provides punishment for a large variety of offenses. (See Compilation of Acts of Phil. Com., title 44, pp. 1026-52.)

Neither the authorities cited by plaintiff in error in his supplemental brief, nor those cited in the brief heretofore filed on behalf of the Government, will be here reviewed, as they speak for themselves. It is insisted, however, that under those authorities the prohibition of cruel and unusual punishment has no application to a punishment which only exceeds in degree such punishment as is usually inflicted in other jurisdictions for the same or like offense.

Plaintiff in error now insists, not only that the punishment inflicted in this case is cruel and unusual, but that the law itself under which the judgment was pronounced is in violation of the statutory provision prohibiting cruel and unusual punishment.

But certainly the statute which prohibits the falsification of records by a public official was not abrogated by the clause in the act of July 1, 1902, prohibiting cruel and unusual punishment, and it still remains unlawful to falsify such records. But if the punishment provided be regarded as too severe, will the court hold that that clause of the law is a nullity, and that there is no means of enforcing it, or will it undertake to draw a line beyond which the law is a nullity and just where the punishment begins to be cruel and unusual? Is it not clear that the punishment provided for by the law is one within the legislative discretion, and that it presents a question which should be dealt with by the Philippine Commission and not by the courts?

J. A. FOWLER,
Assistant Attorney-General.

DECEMBER, 1909.

O

WEEMS v. UNITED STATES.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 20. Argued November 30, December 1, 1909.—Decided May 2, 1910.

A paramount governmental authority may make use of subordinate governmental instruments, without the creation of a distinct legal entity as is the case of the United States and the United States Government of the Philippine Islands.

Under the Philippine Criminal Code of Procedure a public offense need not necessarily be described in the information in exact words of the statute but only in ordinary and concise language, so as to enable a person of common understanding to understand the charge and the court to pronounce judgment.

A charge describing the accused as a public official of the United States Government of the Philippine Islands and his offense as falsifying a public and official document in this case held sufficient. *Carrington v. United States*, 208 U. S. 1, distinguished.

The provision in Rule 35 that this court may at its option notice a plain error not assigned, is not a rigid rule controlled by precedent but confers a discretion exercisable at any time, regardless of what may have been done at other times; the court has less reluctance to disregard prior examples in criminal, than in civil, cases; and will act under the Rule when rights constitutional in nature or secured under a bill of rights are asserted.

Although not raised in the courts below, this court will, under Rule 35, consider an assignment of error made for the first time in this court that a sentence is cruel and unusual within the meaning of the Eighth Amendment to the Constitution or of the similar provision in the Philippine bill of rights.

In interpreting the Eighth Amendment it will be regarded as a precept of justice that punishment for crime should be graduated and proportioned to the offense.

A provision of the Philippine bill of rights taken from the Constitution of the United States must have the same meaning, and so held that the provision prohibiting cruel and unusual punishments must be interpreted as the Eighth Amendment has been.

What constitutes a cruel and unusual punishment prohibited by the Eighth Amendment has not been exactly defined and no case has heretofore occurred in this court calling for an exhaustive definition.

While legislation, both statutory and constitutional, is enacted to remedy existing evils, its general language is not necessarily so confined and it may be capable of wider application than to the mischief giving it birth.

The Eighth Amendment is progressive and does not prohibit merely the cruel and unusual punishments known in 1689 and 1787, but may acquire wider meaning as public opinion becomes enlightened by humane justice, and a similar provision in the Philippine bill of rights applies to long continued imprisonment with accessories disproportionate to the offense.

While the judiciary may not oppose its power to that of the legislature in defining crimes and their punishment as to expediency, it is the duty of the judiciary to determine whether the legislature has contravened a constitutional prohibition and in that respect and for that purpose the power of the judiciary is superior to that of the legislature.

It is within the power of this court to declare a statute of the Penal Code defining a crime and fixing its punishment void as violative of the provision in the Philippine bill of rights prohibiting cruel and unusual punishment.

In determining whether a punishment is cruel and unusual as fixed by the Philippine Commission, this court will consider the punishment of the same or similar crimes in other parts of the United States, as exhibiting the difference between power unrestrained and that exercised under the spirit of constitutional limitations formed to establish justice.

Where the statute unites all the penalties the court cannot separate them even if separable, unless it is clear that the union was not made imperative by the legislature; and in this case held that the penalties of *cadena temporal*, principal and accessories, under art. 56 of the Penal Code of the Philippine Islands are not independent of each other.

Where the minimum sentence which the court might impose is cruel and unusual within the prohibition of a bill of rights, the fault is in the law and not in the sentence, and if there is no other law under which sentence can be imposed it is the duty of the court to declare the law void.

Where sentence cannot be imposed under any law except that declared unconstitutional or void the case cannot be remanded for new sentence but the judgment must be reversed with directions to dismiss the proceedings.

In this case the court declared § 56 of the Penal Code of the Philippine

Islands and a sentence pronounced thereunder, void as violating the provision in the Philippine bill of rights contained in § 5 of the act of July 1, 1902, c. 1369, 32 Stat. 691, against the imposition of excessive fines and the infliction of cruel and unusual punishment, in so far as being prescribed for an offense by an officer of the Government of making false entries in public records as to payments of 616 pesos; the punishment being a fine of 4,000 pesos, and *cadena temporal* of over twelve years with accessories, such accessories including the carrying of chains, deprivation of civil rights during imprisonment and thereafter perpetual disqualification to enjoy political rights, hold office, etc., and subjection besides to surveillance.

The history of the adoption of the Eighth Amendment to the Constitution of the United States and cases involving constitutional prohibitions against excessive fines and cruel and unusual punishment reviewed and discussed in the opinion of the court and the dissenting opinion.

THE facts, which involve the legality of § 56 of the Penal Code of the Philippine Islands, and a sentence thereunder, under the guarantees against cruel and unusual punishments of the bill of rights of the Philippine Islands as expressed in the act of July 1, 1902, are stated in the opinion.

Mr. A. S. Worthington for plaintiff in error:

If Weems was a public official of any Government, it was the government of the Philippine Islands, and not the United States Government. See acts of March 8, 1902, 32 Stat. 54; July 1, 1902, 32 Stat. 691, in which in a great variety of ways they distinguish between the Government of the United States and the government of the Philippine Islands, especially in §§ 4, 53, 67, 71, 74 and 76-83.

The same distinction is maintained in the Coinage Act of March 2, 1903, 32 Stat. 952; and in the legislation of the island government. See §§ 3395, 3399, 3402, 1366 and 2570, Comp. Acts of the Phil. Comm.

This objection does not relate to a matter of form, but is substantial. *Carrington v. United States*, 208 U. S. 1. The omission of any statement in the record that the defendant

Argument for Plaintiff in Error.

217 U. S.

was present at the trial is another fatal defect. Certainly something more than an inference from the opinion of an appellate court is required to show that a person accused of a crime, that may be punished by a long term of imprisonment, was present at his trial. His presence was essential to a valid trial and could not be waived. 1 Bish. Cr. Pro. 271, 1353; *Hoyt v. Utah*, 110 U. S. 574.

The sentence in this case imposed a cruel and unusual punishment, and for that reason it should be set aside, even if the conviction be not reversed.

In *O'Neil v. Vermont*, 144 U. S. 323, the majority of the court refused to consider this question, because it was not assigned as error, and because the Eighth Amendment has always been held not to apply to the States; but see dissents of Justices Field, Harlan and Brewer. In *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 111, it was held that a fine may be so unreasonable as to amount to taking property without due process of law. In *Paraiso v. United States*, 207 U. S. 368, the question arose but was not decided.

Adjudications on this question are few in number, but see *State v. G. H. & S. A. R. Co.*, 100 Texas, 153, 174, 175.

While all of the provisions of the Constitution of the United States relating to criminal proceedings, have not been extended to the Philippines certain provisions of the Constitution have been made applicable to the Philippine Islands under the act of July 1, 1902, including the prohibition against excessive bail and fines and cruel and unusual punishment.

The language of the act is the same as that of the Eighth Amendment, except that the word "punishment" is used instead of "punishments." *Pervear v. Commonwealth*, 5 Wall. 475; *Kemmler's Case*, 136 U. S. 436; *Howard v. Fleming*, 191 U. S. 126, 135, do not affect the present case.

As to the limitations on punishment under Amendment VIII, see Cooley's Const. Lim., 7th ed.; Maxwell's Crim. Proc., p. 661, cited with approval in *Charles v. State*, 27 Nebraska, 881; *Stoutenburg v. Frazier*, 16 App. D. C. 229, and *State v. Driver*,

217 U. S.

Argument for Plaintiff in Error.

78 N. C. 423, in which a punishment was held unusual because it was excessive. In it, the court citing the case of Lord Devonshire, 11 State Trials, 1354, in which the House of Lords held that a fine of £30,000 was excessive and exorbitant, against Magna Charta, and the common right of the subject and the laws of the land. See also *Hobbs v. State*, 32 N. E. Rep. 1019, and *Johnson v. Waukesha Co.*, 64 Wisconsin, 281, 288.

Penalties must be fixed with regard to the offense and cannot all be thrown in together, large and small, under the same measure of punishment. *Matter of Frazee*, 63 Michigan, 397, 408, and see *People v. Murray*, 76 Michigan, 10, reversing the judgment in the case for errors at the trial, and commenting upon the severity of a sentence of fifty years as being in violation of a clause of the state constitution prohibiting unusual punishments. In *State v. Whitaker*, 48 La. Ann. 527 a judgment was held void under a constitutional provision identical with the Eighth Amendment, because it sentenced the relators to imprisonment for 2,160 days in default of their paying fines aggregating \$720. The legislature cannot inflict the death penalty as a punishment for a simple misdemeanor. *Thomas v. Kincaid*, 55 Arkansas, 502; *Martin v. Johnston*, 33 S. W. Rep. 306.

Where a statute fixes a minimum penalty but gives the court or jury a discretion to go beyond it such discretion must be exercised in reason and justice and in subordination to the constitutional provision prohibiting cruel and unusual punishments. *State v. Baker*, 3 So. Dak. 2941.

Courts would not be justified in interfering with the discretion and judgment of the legislature, except in very extreme cases, *Matter of Bayard*, 63 How. Pr. (N. Y.) *73, of punishments so disproportionate to the offense as to shock the sense of the community. Whether the punishment in a given case is cruel or unusual depends, of course, in some degree, upon the punishment inflicted for other offenses. See Penal Laws of the United States as revised and amended by act of March 4, 1909, 35 Stat. 1088, and Code of District of Colum-

bia of March 3, 1891, from which it will be seen, that, in many cases, either in the Federal statutes or in the District Code, there is no minimum term of imprisonment, that being left to the court. A law requiring a convicted person to be imprisoned for *not less than twelve years* cannot be found in any statute in this country save for the most enormous crimes. Certainly not for such a petty offense as that of which plaintiff in error has been convicted.

While under the Philippine laws some crimes are punished with a severity unknown to any jurisdiction in the United States, even there this sentence is oppressive to the last degree. For illustrations of penalties prescribed in the Philippines for other crimes, see § 390 of the Penal Code, by which a public official embezzling public funds can be punished as severely as the plaintiff in error, only if his embezzlement exceeds 125,000 pesetas.

Even under Philippine laws, one who is guilty of treason or misprision of treason or conspiracy to overthrow the Government of the United States or sedition or perjury may be sent to prison for only thirty days and, except only in case of treason, cannot be imprisoned for a longer term than from six to ten years; and one who embezzles any sum, however great, cannot be imprisoned for more than ten years, and may escape with two years.

Mr. Assistant Attorney General Fowler, with whom *Mr. Henry M. Hoyt*, formerly Solicitor General, was on the brief, for the United States:

The fact that the record fails to show that plaintiff in error was present during the trial is not a valid ground for reversal.

The third ground relied upon, that the punishment inflicted upon plaintiff in error is cruel and unusual, does not afford ground for jurisdiction, nor is the punishment cruel and unusual within the meaning of that expression as used in the act of July 1, 1902.

This question does not give ground for jurisdiction, be-

cause it was for the first time mentioned in brief of plaintiff in error in this court. *Paraiso v. United States*, 207 U. S. 368, 370; *Lawler v. Walker*, 14 How. 149, 152; *Spies v. Illinois*, 123 U. S. 131, 181; *Brooks v. Missouri*, 124 U. S. 394; *Morrison v. Watson*, 154 U. S. 111, 115; *Winona &c. Land Co. v. Minnesota*, 159 U. S. 540; *Oxley Stave Co. v. Butler Co.*, 166 U. S. 648, 658; *Citizens' Bank v. Owensboro*, 173 U. S. 636, 643; *Home for Incurables v. New York*, 187 U. S. 155, 157; *Johnson v. Insurance Co.*, 187 U. S. 491, 495; *Chicago Ry. Co. v. McGuire*, 196 U. S. 128; *Hurlbert v. Chicago*, 202 U. S. 275; *Osborne v. Clark*, 204 U. S. 565; *Serra v. Mortiga*, 204 U. S. 470; *Arkansas v. Schlierholz*, 179 U. S. 598; *Carey v. Houston &c. Ry. Co.*, 150 U. S. 170, 181; *Ansbro v. United States*, 159 U. S. 695; *Cornell v. Green*, 163 U. S. 75, 78; *Cincinnati &c. Ry. Co. v. Thiebaud*, 177 U. S. 615, 620.

The sentence imposed is not a cruel and unusual punishment within the meaning of that expression as used in the act of July 1, 1902, nor are the provisions of the Philippine Criminal Code, under which the sentence was pronounced, in contravention of the provisions of said act.

The law was one existing in the Philippine Islands at the time of their cession to the United States, and the Philippine Commission was charged by the President to maintain the body of laws which regulated the rights and obligations of the people, with as little change as expedient, and although this law has been enforced by the courts ever since the Philippines became territory of the United States, yet the Philippine Commission has not deemed it proper to modify this provision in any respect, notwithstanding the fact that they have enacted a very extensive criminal code which defines and provides punishment for a large variety of offenses. See *Compilation of Acts of Phil. Com.*, tit. 44, pp. 1026-1052.

The prohibition of cruel and unusual punishment has no application to a punishment which only exceeds in degree such punishment as is usually inflicted in other jurisdictions for the same or like offense.

The statute which prohibits the falsification of records by a public official was not abrogated by the clause in the act of July 1, 1902, prohibiting cruel and unusual punishment, and it still remains unlawful to falsify such records even if the punishment provided be regarded as too severe; the court will not hold that that clause of the law is a nullity, and that there is no means of enforcing it, nor will it undertake to draw a line beyond which the law is a nullity and just where the punishment begins to be cruel and unusual.

The punishment imposed is not cruel or unusual within the meaning of the Philippine bill of rights.

The Philippine courts are guided in fixing the amount of a penalty by the circumstances attending the offense, whether extenuating or aggravating. See § 81 of the Penal Code.

The fine imposed is a moderate one.

There is nothing cruel or unusual in a long term of imprisonment, as the words are used in the Bill of Rights. The description there refers rather to mutilations and degradations, and not to length or duration of the punishment. The penalty of *cadena temporal*, which article 300 prescribes for this class of offenses, includes a term of imprisonment ranging from twelve years and one day to twenty years; articles 28, 96, Penal Code; and the sentence of fifteen years imposed here is therefore well within the law.

This court has not passed upon the meaning of the words cruel and unusual punishment. See *Wilkerson v. Utah*, 99 U. S. 130; *In re Kemmler*, 136 U. S. 436.

While the state courts are not entirely in accord as to the meaning of the term, the majority of the cases hold that the words employed in the Constitution signify such punishment as would amount to torture, or which is so cruel as to shock the conscience and reason of men; that something inhuman and barbarous is implied. *State v. Williams*, 88 Missouri, 310; *Miller v. State*, 49 N. E. Rep. 894; *Hobbs v. State*, 32 N. E. Rep. 1019; *In re Bayard*, 25 Hun, 546; *State v. Becker*, 51 N. W. Rep. 1018; *Territory v. Ketchum*, 65 Pac. Rep. 169;

People v. Morris, 45 N. W. Rep. 591. See also *O'Neil v. Vermont*, 144 U. S. 323, 331, quoting without disapproval, the opinion of the Supreme Court of Vermont sustaining a very large fine in the aggregate and a very long term of imprisonment in addition as not violating the constitutional guarantees.

If the punishment in this case seems excessive compared with the offense, it is for the Philippine legislative power or for Congress to change the law.

MR. JUSTICE MCKENNA delivered the opinion of the court.¹

This writ of error brings up for review the judgment of the Supreme Court of the Philippine Islands, affirming the conviction of plaintiff in error for falsifying a "public and official document."

In the "complaint," by which the prosecution was begun, it was charged that the plaintiff in error, "a duly appointed, qualified and acting disbursing officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands," did, as such, "corruptly and with intent, then and there, to deceive and defraud the United States Government of the Philippine Islands, and its officials, falsify a public and official document, namely, a cash book of the captain of the Board of Manila, Philippine Islands, and the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands," kept by him as disbursing officer of that bureau. The falsification, which is alleged with much particularity, was committed by entering as paid out, "as wages of employés of the Light House Service

¹ This case was argued before seven justices, Mr. Justice Moody being absent on account of sickness and Mr. Justice Lurton not then having taken his seat. Mr. Justice Brewer died before the opinion was delivered. Mr. Justice McKenna delivered the opinion of the court, the Chief Justice, Mr. Justice Harlan and Mr. Justice Day concurring with him. Mr. Justice White delivered a dissenting opinion (p. 382, *post*), Mr. Justice Holmes concurring with him.

of the United States Government of the Philippine Islands," at the Capul Light House of 208 pesos, and for like service at the Matabriga Light House of 408 pesos, Philippine currency. A demurrer was filed to the "complaint," which was overruled.

He was convicted, and the following sentence was imposed upon him: "To the penalty of fifteen years of Cadena, together with the accessories of section 56 of the Penal Code, and to pay a fine of four thousand pesetas, but not to serve imprisonment as a subsidiary punishment in case of his insolvency, on account of the nature of the main penalty, and to pay the costs of this cause."

The judgment and sentence were affirmed by the Supreme Court of the islands.

It is conceded by plaintiff in error that some of the questions presented to the Supreme Court of the Philippine Islands cannot be raised in this court, as the record does not contain the evidence. Indeed, plaintiff in error confines his discussion to one point raised in the court below and to three other questions, which, though not brought to the attention of the Supreme Court of the islands, and not included in the assignment of errors filed with the application for the writ of error are of such importance, it is said, that this court will consider them under the right reserved in Rule 35.¹

¹ Rule 35. Assignments of Errors. 1. Where an appeal or a writ of error is taken from a District Court or a Circuit Court direct to this court, under § 5 of the act entitled "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the

These questions which are assigned as error on the argument here are as follows:

"1. The court below erred in overruling the demurrer to the complaint, this assignment being based upon the fact that in the complaint the plaintiff in error is described as the 'disbursing officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands,' and the cash book referred to in the complaint is described as a book 'of the captain of the port of Manila, Philippine Islands,' whereas there is no such body politic as the 'United States Government of the Philippine Islands.'

"2. The record does not disclose that the plaintiff in error was arraigned, or that he pleaded to the complaint after his demurrer was overruled and he was 'ordered to plead to the complaint.'

"3. The record does not show that the plaintiff in error was present when he was tried, or, indeed, that he was present in court at any time.

"4. The punishment of fifteen years' imprisonment was a cruel and unusual punishment, and, to the extent of the sentence, the judgment below should be reversed on this ground."

The second assignment of error was based upon a misapprehension of the fact, and has been abandoned.

The argument to support the first assignment of error is based upon certain acts of Congress and certain acts of the Philippine Commission in which the Government of the United States and the government of the Islands are distinguished.

part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

2. The plaintiff in error or appellant shall cause the record to be printed, according to the provisions of §§ 2, 3, 4, 5, 6, and 9 of Rule 10.

For this and all rules of the Supreme Court of the United States, see Appendix 210 U. S.

And it is urged that in one of the acts (§ 3396 of the acts of the commission) it is recognized that there may be allegiance to or treason against both or "either of them," and (§ 3397) that there may be "rebellion or insurrection against the authority" of either, and (§ 3398) that there may be a conspiracy to overthrow either or to "prevent, hinder or delay the execution of any law of either." Other sections are cited, in which, it is contended, that the insular government is spoken of as an "entity," and distinguished from that of the United States. Section 1366, which defines the duty of the Attorney General, it is pointed out, especially distinguishes between "causes, civil or criminal, to which the United States or any officer thereof in his official capacity is a party," and causes, civil or criminal, to which the "government of the Philippine Islands or any officer thereof in his official capacity is a party." And still more decisively, it is urged, by subdivision "C" of § 1366, in which it is recognized that the cause of action may be for money, and that the judgment may be for money "belonging to the Government of the United States, that of the Philippine Islands or some other province." It is, therefore, contended that the Government of the United States and that of the Philippine Islands are distinct legal entities, and that there may be civil obligations to one and not to the other, that there may be governmental liability to the one and not to the other, and that proceedings, civil or criminal, against either must recognize the distinction to be sufficient to justify a judgment. To apply these principles, let us see what the information charges. It describes Weems, plaintiff in error, as "a public official of the United States Government of the Philippine Islands, to wit, a duly appointed and qualified acting disbursing official of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands," and it is charged that by taking advantage of his official position to intend to "deceive and defraud the United States Government of the Philippine Islands," he falsified a public and official document. In the same manner the Gov-

ernment is designated throughout the information. It is contended that "there is no such body politic as the 'United States Government of the Philippine Islands,'" and, it is urged, that the objection does not relate to a matter of form. "It is as substantial," it is said, as the point involved in *Carrington's Case*, 208 U. S. 1, where a military officer of the United States was prosecuted as a civil officer of the government of the Philippines. His conviction was reversed, this court holding that, "as a soldier, he was not an official of the Philippines but of the United States."

It is true that the distinctions raised are expressed in the statutes, and necessarily so. It would be difficult otherwise to provide for government where there is a paramount authority making use of subordinate instrumentalities. We have examples in the States of the Union and their lesser municipal divisions, and rights may flow from and to such lesser divisions. And the distinction in the Philippine statutes means no more than that, and, conforming to that, a distinction is clearly made in the information. Weems' official position is described as "Disbursing Officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands." There is no real uncertainty in this description, and whatever technical nicety of discrimination might have been insisted on at one time, cannot now be, in view of the provisions of the Philippine Criminal Code of Procedure, which require a public offense to be described in "ordinary and concise language," not necessarily in the words of the statute, "but in such form as to enable a person of common understanding to know what is intended and the court to pronounce judgment according to the right." And it is further provided that "No information or complaint is insufficient nor can the trial, judgment, or other proceeding be affected by reason of a defect in matter of form which does not tend to prejudice a substantial right of the defendant upon the merits" (§ 10).

Carrington v. United States, 208 U. S. 1, is not in point. In

that case it was attempted to hold Carrington guilty of an offense as a civil officer for what he had done as a military officer. As he was the latter, he had not committed any offense under the statute. The first assignment of error is therefore not sustained.

It is admitted, as we have seen, that the questions presented by the third and fourth assignments of error were not made in the courts below, but a consideration of them is invoked under Rule 35, which provides that this court, "at its option, may notice a plain error not assigned."

It is objected on the other side that *Paraiso v. United States*, 207 U. S. 368, stands in the way. But the rule is not altogether controlled by precedent. It confers a discretion that may be exercised at any time, no matter what may have been done at some other time. It is true we declined to exercise it in *Paraiso v. United States*, but we exercised it in *Wiborg v. United States*, 163 U. S. 632, 658; *Clyatt v. United States*, 197 U. S. 207, 221, and *Crawford v. United States*, 212 U. S. 183. It may be said, however, that *Paraiso v. United States* is more directly applicable, as it was concerned with the same kind of a crime as that in the case at bar, and that it was contended there as here that the amount of fine and imprisonment imposed inflicted a cruel and unusual punishment. It may be that we were not sufficiently impressed with the importance of those contentions or saw in the circumstances of the case no reason to exercise our right of review under Rule 35. As we have already said, the rule is not a rigid one, and we have less reluctance to disregard prior examples in criminal cases than in civil cases, and less reluctance to act under it when rights are asserted which are of such high character as to find expression and sanction in the Constitution or bill of rights. And such rights are asserted in this case.

The assignment of error is that "A punishment of fifteen years' imprisonment was a cruel and unusual punishment, and, to the extent of the sentence, the judgment below should be reversed on this ground." Weems was convicted, as we

have seen, for the falsification of a public and official document, by entering therein, as paid out, the sums of 208 and 408 pesos, respectively, as wages to certain employés of the Light House service. In other words, in entering upon his cash book those sums as having been paid out when they were not paid out, and the "truth," to use the language of the statute, was thereby perverted "in the narration of facts."

A false entry is all that is necessary to constitute the offense. Whether an offender against the statute injures any one by his act or intends to injure any one is not material, the trial court held. The court said: "It is not necessary that there be any fraud nor even the desire to defraud, nor intention of personal gain on the part of the person committing it, that a falsification of a public document be punishable; it is sufficient that the one who committed it had the intention to pervert the truth and to falsify the document, and that by it damage might result to a third party." The court further, in the definition of the nature of the offense and the purpose of the law, said, "in public documents the law takes into consideration not only private interests, but also the interests of the community," and it is its endeavor (and for this a decision of the Supreme Court of Spain, delivered in 1873, was quoted) "to protect the interest of society by the most strict faithfulness on the part of a public official in the administration of the office intrusted to him," and thereby fulfill the "responsibility of the State to the community for the official or public documents under the safeguard of the State." And this was attempted to be secured through the law in controversy. It is found in § 1 of chapter IV of the Penal Code of Spain. The caption of the section is "falsification of official and commercial documents and telegraphic dispatches." Article 300 provides as follows: "The penalties of *cadena temporal* and a fine of from 1,250 to 12,500 pesetas shall be imposed on a public official who, taking advantage of his authority, shall commit a falsification. . . . by perverting the truth in the narration of facts. . . ."

By other provisions of the code we find that there are only

two degrees of punishment higher in scale than *cadena temporal*, death, and *cadena perpetua*. The punishment of *cadena temporal* is from twelve years and one day to twenty years (arts. 28 and 96), which "shall be served" in certain "penal institutions." And it is provided that "those sentenced to *cadena temporal* and *cadena perpetua* shall labor for the benefit of the state. They shall always carry a chain at the ankle, hanging from the wrists; they shall be employed at hard and painful labor, and shall receive no ~~assistance~~ whatsoever from without the institution." Arts. 105, 106. There are besides certain accessory penalties imposed, which are defined to be (1) civil interdiction; (2) perpetual absolute disqualification; (3) subjection to surveillance during life. These penalties are defined as follows:

"Art. 42. Civil interdiction shall deprive the person punished as long as he suffers it, of the rights of parental authority, guardianship of person or property, participation in the family council, marital authority, the administration of property, and the right to dispose of his own property by acts *inter vivos*. Those cases are excepted in which the law explicitly limits its effects.

"Art. 43. Subjection to the surveillance of the authorities imposes the following obligations on the persons punished.

"1. That of fixing his domicil and giving notice thereof to the authority immediately in charge of his surveillance, not being allowed to change it without the knowledge and permission of said authority in writing.

"2. To observe the rules of inspection prescribed.

"3. To adopt some trade, art, industry, or profession, should he not have known means of subsistence of his own.

"Whenever a person punished is placed under the surveillance of the authorities, notice thereof shall be given to the government and to the governor general."

The penalty of perpetual absolute disqualification is the deprivation of office, even though it be held by popular election, the deprivation of the right to vote or to be elected to

public office, the disqualification to acquire honors, etc., and the loss of retirement pay, etc.

These provisions are attacked as infringing that provision of the bill of rights of the islands which forbids the infliction of cruel and unusual punishment. It must be confessed that they, and the sentence in this case, excite wonder in minds accustomed to a more considerate adaptation of punishment to the degree of crime. In a sense the law in controversy seems to be independent of degrees. One may be an offender against it, as we have seen, though he gain nothing and injure nobody. It has, however, some human indulgence—it is not exactly Draconian in uniformity. Though it starts with a severe penalty, between that and the maximum penalty it yields something to extenuating circumstances. Indeed, by article 96 of the Penal Code the penalty is declared to be "divisible," and the legal term of its "duration is understood as distributed into three parts forming the three degrees—that is, the minimum, medium, and maximum," being respectively from twelve years and one day to fourteen years and eight months, from fourteen years eight months and one day to seventeen years and four months, from seventeen years four months and one day to twenty years. The law therefore allows a range from twelve years and a day to twenty years, and the Government in its brief ventures to say that "the sentence of fifteen years is well within the law." But the sentence is attacked as well as the law, and what it is to be well within the law a few words will exhibit. The minimum term of imprisonment is twelve years, and that, therefore, must be imposed for "perverting the truth" in a single item of a public record, though there be no one injured, though there be no fraud or purpose of it, no gain or desire of it. Twenty years is the maximum imprisonment, and that only can be imposed for the perversion of truth in every item of an officer's accounts, whatever be the time covered and whatever fraud it conceals or tends to conceal. Between these two possible sentences, which seem to have no adaptable relation, or rather

in the difference of eight years for the lowest possible offense and the highest possible, the courts below selected three years to add to the minimum of twelve years and a day for the falsification of two items of expenditure, amounting to the sums of 408 and 204 pesos. And the fine and "accesories" must be brought into view. The fine was four thousand pesetas, an excess also over the minimum. The "accesories" we have already defined. We can now give graphic description of Weems' sentence and of the law under which it was imposed. Let us confine it to the minimum degree of the law, for it is with the law that we are most concerned. Its minimum degree is confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council. These parts of his penalty endure for the term of imprisonment. From other parts there is no intermission. His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicil without giving notice to the "authority immediately in charge of his surveillance," and without permission in writing. He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even that hope is taken from him and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty. No circumstance of degradation is omitted. It may be that even the cruelty of pain is not omitted. He must bear a chain night and day. He is condemned to painful as well as hard labor. What painful labor may mean we have no exact measure. It must be something more than hard labor. It may be hard labor pressed to the point of pain. Such penalties for such offenses amaze those

who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense.

Is this also a precept of the fundamental law? We say fundamental law, for the provision of the Philippine bill of rights, prohibiting the infliction of cruel and unusual punishment, was taken from the Constitution of the United States and must have the same meaning. This was decided in *Kepner v. United States*, 195 U. S. 100, 122; and *Serra v. Mortiga*, 204 U. S. 470. In *Kepner v. United States* this court considered the instructions of the President to the Philippine Commission and quoted from them the admonition to the commission that the government that we were establishing was not designed "for our satisfaction or for the expression of our theoretical views, but for the happiness, peace and prosperity of the people of the Philippine Islands, and the measures adopted should be made to conform to their customs, their habits, and even their prejudices, to the fullest extent consistent with the accomplishment of the indispensable requisites of just and effective government." But, it was pointed out, a qualification accompanied the admonition, and the commission was instructed "to bear in mind" and the people of the islands "made plainly to understand" that certain great principles of government had been made the basis of our governmental system which were deemed "essential to the rule of law and the maintenance of individual freedom." And the President further declared that there were "certain practical rules of government which we have found to be essential to the preservation of those great principles of liberty and law." These he admonished the commission to establish and maintain in the islands "for the sake of their liberty and happiness," however they might conflict with the customs or laws of procedure with which they were familiar. In view of the importance of these principles and rules, which the President said the "enlightened

thought of the Philippine Islands" would come to appreciate, he imposed their observance "upon every division and branch of the government of the Philippines."

Among those rules was that which prohibited the infliction of cruel and unusual punishment. It was repeated in the act of July 1, 1902, providing for the administration of the affairs of the civil government in the islands, and this court said of it and of the instructions of the President that they were "intended to carry to the Philippine Islands those principles of our government which the President declared to be established as rules of law for the maintenance of individual freedom." The instructions of the President and the act of Congress found in nominal existence in the islands the Penal Code of Spain, its continuance having been declared by military order. It may be there was not and could not be a careful consideration of its provisions and a determination to what extent they accorded with or were repugnant to the "great principles of liberty and law" which had been "made the basis of our governmental system." Upon the institution of the government of the commission, if not before, that consideration and determination necessarily came to the courts and are presented by this record.

What constitutes a cruel and unusual punishment has not been exactly decided. It has been said that ordinarily the terms imply something inhuman and barbarous, torture and the like. *McDonald v. Commonwealth*, 173 Massachusetts, 322. The court, however, in that case conceded the possibility "that imprisonment in the State prison for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment." Other cases have selected certain tyrannical acts of the English monarchs as illustrating the meaning of the clause and the extent of its prohibition.

The provision received very little debate in Congress. We find from the Congressional Register, p. 225, that Mr. Smith of South Carolina "objected to the words 'nor cruel and

unusual punishment,' the import of them being too indefinite." Mr. Livermore opposed the adoption of the clause, saying:

"The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lays with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we, in future, to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the legislature to adopt it, but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind."

The question was put on the clause, and it was agreed to by a considerable majority.

No case has occurred in this court which has called for an exhaustive definition. In *Pervear v. The Commonwealth*, 5 Wall. 475, it was decided that the clause did not apply to state but to national legislation. But we went further, and said that we perceive nothing excessive, or cruel or unusual in a fine for fifty dollars and imprisonment at hard labor in the house of correction for three months, which was imposed for keeping and maintaining, without a license, a tenement for the illegal sale and illegal keeping of intoxicating liquors. A decision from which no one will dissent.

In *Wilkerson v. Utah*, 99 U. S. 130, the clause came up again for consideration. A statute of Utah provided that "a person convicted of a capital offense should suffer death by being shot, hanged or beheaded," as the court might direct, or he should "have his option as to the manner of his execution." The statute was sustained. The court pointed out that death was an usual punishment for murder, that it pre-

vailed in the Territory for many years, and was inflicted by shooting, also that that mode of execution was usual under military law. It was hence concluded that it was not forbidden by the Constitution of the United States as cruel or unusual. The court quoted Blackstone as saying that the sentence of death was generally executed by hanging, but also that circumstances of terror, pain or disgrace were sometimes superadded. "Cases mentioned by the author," the court said, "are where the person was drawn or dragged to the place of execution, in treason; or where he was disembowelled alive, beheaded and quartered, in high treason. Mention is also made of public dissection in murder and burning alive in treason committed by a female." And it was further said: "Examples of such legislation in the early history of the parent country are given by the annotator of the last edition of Archbold's treatise. Arch. Crim. Pr. Pl. (eighth edition) 548."

This court's final commentary was that "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution. Cooley, Const. Lim. (4th ed.) 408; Wharton, Cr. L. (7th ed.), § 3405."

That passage was quoted in *In re Kemmler*, 136 U. S. 436, 447, and this comment was made: "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, and something more than the mere extinguishment of life." The case was an application for *habeas corpus* and went off on a question of jurisdiction, this court holding that the Eighth Amendment did not apply to state legislation. It was not meant in the language we have quoted to give a comprehensive definition of cruel and unusual

punishment, but only to explain the application of the provision to the punishment of death. In other words, to describe what might make the punishment of death, cruel and unusual, though of itself it is not so. It was found as a fact by the state court that death by electricity was more humane than death by hanging.

In *O'Neil v. Vermont*, 144 U. S. 323, the question was raised but not decided. The reasons given for this were that because it was not as a Federal question assigned as error, and, so far as it arose under the constitution of Vermont, it was not within the province of the court to decide. Moreover, it was said, as a Federal question, it had always been ruled that the Eighth Amendment of the Constitution of the United States did not apply to the States. Mr. Justice Field, Mr. Justice Harlan and Mr. Justice Brewer were of the opinion that the question was presented, and Mr. Justice Field, construing the clause of the Constitution prohibiting the infliction of cruel and unusual punishments, said, the other two justices concurring, that the inhibition was directed, not only against punishments which inflict torture, "but against all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged." He said further: "The whole inhibition is against that which is excessive in the bail required or fine imposed, or punishment inflicted."

The law writers are indefinite. Story in his work on the Constitution, vol. 2, § 1903, says that the provision "is an exact transcript of a clause in the bill of rights framed in the revolution of 1688." He expressed the view that the provision "would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct." He, however, observed that it was "adopted as an admonition to all departments of the national government, to warn them against such violent proceedings as has taken place in England in the arbitrary reigns of some of the Stuarts." For this he cites 2 Elliott's Debates, 345, and refers to 2 Lloyd's

Debates, 225, 226; 3 Elliott's Debates, 345. If the learned author meant by this to confine the prohibition of the provision to such penalties and punishment as were inflicted by the Stuarts, his citations do not sustain him. Indeed, the provision is not mentioned except in 2 Elliott's Debates, from which we have already quoted. The other citations are of the remarks of Patrick Henry in the Virginia Convention, and of Mr. Wilson in the Pennsylvania Convention. Patrick Henry said that there was danger in the adoption of the Constitution without a bill of rights. Mr. Wilson considered that it was unnecessary, and had been purposely omitted from the Constitution. Both, indeed, referred to the tyranny of the Stuarts. Henry said that the people of England in the bill of rights prescribed to William, Prince of Orange, upon what terms he should reign. Wilson said that "The doctrine and practice of a declaration of rights have been borrowed from the conduct of the people of England on some remarkable occasions; but the principles and maxims on which their government is constituted are widely different from those of ours." It appears, therefore, that Wilson, and those who thought like Wilson, felt sure that the spirit of liberty could be trusted, and that its ideals would be represented, not debased, by legislation. Henry and those who believed as he did would take no chances. Their predominant political impulse was distrust of power, and they insisted on constitutional limitations against its abuse. But surely they intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty

Opinion of the Court.

could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked. We say "coercive cruelty," because there was more to be considered than the ordinary criminal laws. Cruelty might become an instrument of tyranny; of zeal for a purpose, either honest or sinister.

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction. There is an example of this in *Cummings v. State of Missouri*, 4 Wall. 277, where the prohibition against *ex post facto* laws was given a more extensive application than what a minority of this court

thought had been given in *Calder v. Bull*, 3 Dall. 386. See also *Ex parte Garland*, 4 Wall. 333. The construction of the Fourteenth Amendment is also an example for it is one of the limitations of the Constitution. In a not unthoughtful opinion Mr. Justice Miller expressed great doubt whether that Amendment would ever be held as being directed against any action of a State which did not discriminate "against the negroes as a class, or on account of their race." *Slaughterhouse Cases*, 16 Wall. 36, 81. To what extent the Amendment has expanded beyond that limitation need not be instanced.

There are many illustrations of resistance to narrow constructions of the grants of power to the National Government. One only need be noticed, and we select it because it was made against a power which more than any other is kept present to our minds in visible and effective action. We mean the power over interstate commerce. This power was deduced from the eleven simple words, "to regulate commerce with foreign nations and among the several States." The judgment which established it was pronounced by Chief Justice Marshall (*Gibbons v. Ogden*), and reversed a judgment of Chancellor Kent, justified, as that celebrated jurist supposed, by a legislative practice of fourteen years and fortified by the opinions of men familiar with the discussions which had attended the adoption of the Constitution. Persuaded by such considerations the learned chancellor confidently decided that the Congressional power related to "external, not to internal, commerce," and adjudged that under an act of the State of New York, Livingston and Fulton had the exclusive right of using steam-boats upon all of the navigable waters of the State. The strength of the reasoning was not underrated. It was supported, it was said, "by great names, by names which have all the titles to consideration that virtue, intelligence and office can bestow." The narrow construction, however, did not prevail, and the propriety of the arguments upon which it was based was questioned. It was said, in effect, that they supported a construction which "would cripple the govern-

ment and render it unequal to the objects for which it was declared to be instituted, and to which the powers given, as fairly understood, render it competent;"

But general discussion we need not farther pursue. We may rely on the conditions which existed when the Constitution was adopted. As we have seen, it was the thought of Story, indeed, it must come to a less trained reflection than his, that government by the people instituted by the Constitution would not imitate the conduct of arbitrary monarchs. The abuse of power might, indeed, be apprehended, but not that it would be manifested in provisions or practices which would shock the sensibilities of men.

Cooley, in his "Constitutional Limitations," apparently in a struggle between the effect to be given to ancient examples and the in consequence of a dread of them in these enlightened times, is not very clear or decisive. He hesitates to advance definite views and expresses the "difficulty of determining precisely what is meant by cruel and unusual punishment." It was probable, however, he says, that "any punishment declared by statute for an offense which was punishable in the same way at common law could not be regarded as cruel or unusual, in a constitutional sense." And he says further that "probably any new statutory offense may be punished to the *extent* [italics ours] and in the mode permitted by the common law for offenses of a similar nature."

In the cases in the state courts different views of the provision are taken. In *State v. Driver*, 78 N. C. 423, 427, it was said that criminal legislation and its administration are so uniformly humane that there is seldom occasion for complaint. In that case a sentence of the defendant for assault and battery upon his wife was imprisonment in the county jail for five years, and at the expiration thereof to give security to keep the peace for five years in the sum of \$500 with sureties, was held to be cruel and unusual. To sustain its judgment the court said that the prohibition against cruel and unusual punishment was not "intended to warn against merely erratic

modes of punishment or torture, but applied expressly to 'bail,' 'fines' and 'punishments.'" It was also said that "the earliest application of the provision in England was in 1689, the first year after the adoption of the bill of rights in 1688, to avoid an excessive pecuniary fine imposed upon Lord Devonshire by the court of King's Bench (11 State Trials, 1354)." Lord Devonshire was fined thirty thousand pounds for an assault and battery upon Colonel Culpepper, and the House of Lords, in reviewing the case, took the opinion of the law Lords, and decided that the fine "was excessive and exorbitant, against Magna Charta, the common right of the subject and the law of the land." Other cases have given a narrower construction, feeling constrained thereto by the incidences of history.

In *Hobbs v. State*, 32 N. E. Rep. 1019, the Supreme Court of Indiana expressed the opinion that the provision did not apply to punishment by "fine or imprisonment or both, but such as that inflicted at the whipping post, in the pillory, burning at the stake, breaking on the wheel," etc.

It was further said: "The word, according to modern interpretation, does not affect legislation providing imprisonment for life or for years or the death penalty by hanging or electrocution. If it did, our laws for the punishment of crime would give no security to the citizen." That conclusion certainly would not follow and its expression can only be explained by the impatience the court exhibited at the contention in that case, which attacked a sentence of two years' imprisonment in the state prison for combining to assault, beat and bruise a man in the night time. Indeed the court ventured the inquiry "whether in this country, at the close of the nineteenth century," the provision was "not obsolete," except as an admonition to the courts "against the infliction of punishment so severe as not to 'fit the crime.'" In other words, that it had ceased to be a restraint upon legislatures and had become an admonition only to the courts not to abuse the discretion which might be entrusted to them. Other cases might

be cited in illustration, some looking backwards for examples by which to fix the meaning of the clause; others giving a more expansive and vital character to the provision, such as the President of the United States thought it possessed and admonished the Philippine Commission that it possessed as "essential [with other rights] to the rule of law and the maintenance of individual freedom."

An extended review of the cases in the state courts interpreting their respective constitutions we will not make. It may be said of all of them that there was not such challenge to the import and consequence of the inhibition of cruel and unusual punishments as the law under consideration presents. It has no fellow in American legislation. Let us remember that it has come to us from a government of a different form and genius from ours. It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the bill of rights, both on account of their degree and kind. And they would have those bad attributes even if they were found in a Federal enactment and not taken from an alien source.

Many of the state cases which have been brought to our attention require no comment. They are based upon sentences of courts, not upon the constitutional validity of laws. The contentions in other cases vary in merit and in their justification of serious consideration. We have seen what the contention was in *Hobbs v. State, supra*. In others, however, there was more inducement to an historical inquiry. In *Commonwealth v. Wyatt*, 6 Rand. 694, the whipping post had to be justified and was justified. In comparison with the "barbarities of quartering, hanging in chains, castration, etc., " it was easily reduced to insignificance. The court in the latter case pronounced it "odious but not unusual." Other cases have seen something more than odiousness in it, and have regarded it as one of the forbidden punishments. It is certainly as odious as the pillory, and the latter has been pro-

nounced to be within the prohibitory clause. Whipping was also sustained in *Foot v. State*, 59 Maryland, 264, as a punishment for wife beating. And, it may be, in *Aldridge v. Commonwealth*, 2 Va. Cases, 447. The law considered was one punishing free negroes and mulattoes for grand larceny. Under the law a free person of color could be condemned to be sold as a slave and transported and banished beyond the limits of the United States. Such was the judgment pronounced on the defendant by the trial court and in addition thirty-nine stripes on his bare back. The judgment was held valid on the ground that the bill of rights of the State was "never designed to control the legislative right to determine *ad libitum* upon the adequacy of punishment, but is merely applicable to the modes of punishment." Cooley in his Constitutional Limitations says that it may be well doubted if the right exist "to establish the whipping post and the pillory in those States where they were never recognized as instruments of punishment, or in those States whose constitutions, revised since public opinion had banished them, have forbidden cruel and unusual punishments." The clause of the Constitution in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice. See *Ex parte Wilson*, 114 U. S. 417, 427; *Mackin v. United States*, 117 U. S. 348, 350.

In *Hobbs v. State*, *supra*, and in other cases, prominence is given to the power of the legislature to define crimes and their punishment. We concede the power in most of its exercises. We disclaim the right to assert a judgment against that of the legislature of the expediency of the laws or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such case not our discretion but our legal duty, strictly defined and imperative in its direction, is invoked. Then the legislative power is brought to the judgment of a power superior to it for the

instant. And for the proper exercise of such power there must be a comprehension of all that the legislature did or could take into account, that is, a consideration of the mischief and the remedy. However, there is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety. They have no limitation, we repeat, but constitutional ones, and what those are the judiciary must judge. We have expressed these elementary truths to avoid the misapprehension that we do not recognize to the fullest the wide range of power that the legislature possesses to adapt its penal laws to conditions as they may exist and punish the crimes of men according to their forms and frequency. We do not intend in this opinion to express anything that contravenes those propositions.

Our meaning may be illustrated. For instance, in *Territory v. Ketchum*, 10 N. M. 718, a case that has been brought to our attention as antagonistic to our views of cruel and unusual punishments, a statute was sustained which imposed the penalty of death upon any person who should make an assault upon any railroad train, car or locomotive for the purpose and with the intent to commit murder, robbery or other felony upon a passenger or employé, express messenger or mail agent. The Supreme Court of the Territory discussed the purpose of the Eighth Amendment and expressed views opposed to those we announce in this opinion, but finally rested its decision upon the conditions which existed in the Territory and the circumstances of terror and danger which accompanied the crime denounced. So also may we mention the legislation of some of the States enlarging the common-law definition of burglary, and dividing it into degrees, fixing a severer punishment for that committed in the night time from that committed in the day time, and for arson of buildings in which human beings may be from arson of buildings which may be

Opinion of the Court.

217 U. S.

vacant. In all such cases there is something more to give character and degree to the crimes than the seeking of a felonious gain and it may properly become an element in the measure of their punishment.

From this comment we turn back to the law in controversy. Its character and the sentence in this case may be illustrated by examples even better than it can be represented by words. There are degrees of homicide that are not punished so severely, nor are the following crimes: misprision of treason, inciting rebellion, conspiracy to destroy the Government by force, recruiting soldiers in the United States to fight against the United States, forgery of letters patent, forgery of bonds and other instruments for the purpose of defrauding the United States, robbery, larceny and other crimes. Section 86 of the Penal Laws of the United States, as revised and amended by the act of Congress of March 4, 1909, c. 321 (35 Stat. 1088), provides that any person charged with the payment of any appropriation made by Congress who shall pay to any clerk or other employé of the United States a sum less than that provided by law and require a receipt for a sum greater than that paid to and received by him shall be guilty of embezzlement, and shall be fined in double the amount so withheld and imprisoned not more than two years. The offense described has similarity to the offense for which Weems was convicted, but the punishment provided for it is in great contrast to the penalties of *cadena temporal* and its "accesories." If we turn to the legislation of the Philippine Commission we find that instead of the penalties of *cadena temporal*, medium degree, (fourteen years eight months and one day to seventeen years and four months, with fine and "accesories"), to *cadena perpetua*, fixed by the Spanish penal code for the falsification of bank notes and other instruments authorized by the law of the kingdom, it is provided that the forgery of or counterfeiting the obligations or securities of the United States or of the Philippine Islands shall be punished by a fine of not more than ten thousand pesos and by imprisonment of not more than

fifteen years. In other words, the highest punishment possible for a crime which may cause the loss of many thousand of dollars, and to prevent which the duty of the State should be as eager as to prevent the perversion of truth in a public document, is not greater than that which may be imposed for falsifying a single item of a public account. And this contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice. The State thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal.

It is suggested that the provision for imprisonment in the Philippine code is separable from the accessory punishment, and that the latter may be declared illegal, leaving the former to have application. *United States v. Pridgeon*, 153 U. S. 48, is referred to. The proposition decided in that case was that "where a court has jurisdiction of the person and the offense, the imposition of a sentence in excess of what the law permits does not render the legal and authorized portion of the sentence void, but only leaves such portion of the sentence as may be in excess open to question and attack." This proposition is not applicable to the case at bar. The imprisonment and the accessories were in accordance with the law. They were not in excess of it, but were positively required by it. It is provided in article 106, as we have seen, that those sentenced to *cadena temporal* shall labor for the benefit of the State; shall always carry a chain at the ankle, hanging from the wrist; shall be employed at hard and painful labor; shall receive no assistance whatsoever from without the penal institutions. And it is provided in article 56 that the penalty of *cadena temporal* shall include the accessory penalties.

In *In re Graham*, 138 U. S. 461, it was recognized to be "the

WHITE, J., dissenting.

217 U. S.

general rule that a judgment rendered by a court in a criminal case must conform strictly to the statute, and that any variation from its provisions, either in the character or the extent of punishment inflicted, renders the judgment absolutely void. . . ." In *Ex parte Karstendick*, 93 U. S. 396, 399, it was said: "In cases where the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in its sentence." A similar view was expressed in *In re Mills*, 135 U. S. 263, 266. It was recognized in *United States v. Pridgeon* and the cases quoted which sustained it.

The Philippine code unites the penalties of *cadena temporal*, principal and accessory, and it is not in our power to separate them, even if they are separable, unless their independence is such that we can say that their union was not made imperative by the legislature. *Employers' Liability Cases*, 207 U. S. 463. This certainly cannot be said of the Philippine code, as a Spanish enactment, and the order putting it into effect in the islands did not attempt to destroy the unity of its provisions or the effect of that unity. In other words, it was put into force as it existed with all its provisions dependent. We cannot, therefore, declare them separable.

It follows from these views that, even if the minimum penalty of *cadena temporal* had been imposed, it would have been repugnant to the bill of rights. In other words, the fault is in the law, and, as we are pointed to no other under which a sentence can be imposed, the judgment must be reversed, with directions to dismiss the proceedings.

So ordered.

MR. JUSTICE LURTON, not being a member of the court when this case was argued, took no part in its decision.

MR. JUSTICE WHITE, dissenting.

The Philippine law made criminal the entry in a public record by a public official of a knowingly false statement. The

punishment prescribed for violating this law was fine and imprisonment in a penal institution at hard and painful labor for a period ranging from twelve years and a day to twenty years, the prisoner being subjected, as accessories to the main punishment, to carrying during his imprisonment a chain at the ankle hanging from the wrist, deprivation during the term of imprisonment of civil rights, and subjection besides to perpetual disqualification to enjoy political rights, hold office, etc., and, after discharge, to the surveillance of the authorities. The plaintiff in error, having been convicted of a violation of this law, was sentenced to pay a small fine and to undergo imprisonment for fifteen years, with the resulting accessory punishments above referred to. Neither at the trial in the court of first instance nor in the Supreme Court of the Philippine Islands was any question raised concerning the repugnancy of the statute defining the crime and fixing its punishment to the provision of the Philippine bill of rights, forbidding cruel and unusual punishment. Indeed, no question on that subject was even indirectly referred to in the assignments of error filed in the court below for the purpose of this writ of error. In the brief of counsel, however, in this court the contention was made that the sentence was void, because the term of imprisonment was a cruel and unusual one and therefore repugnant to the bill of rights. Deeming this contention to be of such supreme importance as to require it to be passed upon, although not raised below, the court now holds that the statute, because of the punishment which it prescribes, was repugnant to the bill of rights and therefore void, and for this reason alone reverses and remands with directions to discharge.

The Philippine bill of rights which is construed and applied is identical with the cruel and unusual punishment clause of the Eighth Amendment. Because of this identity it is now decided that it is necessary to give to the Philippine bill of rights the meaning properly attributable to the provision on the same subject found in the Eighth Amendment, as in using the language of that Amendment in the statute it is to be

presumed that Congress intended to give to the words their constitutional significance. The ruling now made, therefore, is an interpretation of the Eighth Amendment, and announces the limitation which that Amendment imposes on Congress when exercising its legislative authority to define and punish crime. The great importance of the decision is hence obvious.

Of course, in every case where punishment is inflicted for the commission of crime, if the suffering of the punishment by the wrongdoer be alone regarded the sense of compassion aroused would mislead and render the performance of judicial duty impossible. And it is to be conceded that this natural conflict between the sense of commiseration and the commands of duty is augmented when the nature of the crime defined by the Philippine law and the punishment which that law prescribes is only abstractly considered, since the impression is at once produced that the legislative authority has been severely exerted. I say only abstractly considered, because the first impression produced by the merely abstract view of the subject is met by the admonition that the duty of defining and punishing crime has never in any civilized country been exerted upon mere abstract considerations of the inherent nature of the crime punished, but has always involved the most practical consideration of the tendency at a particular time to commit certain crimes, of the difficulty of repressing the same, and of how far it is necessary to impose stern remedies to prevent the commission of such crimes. And, of course, as these considerations involve the necessity for a familiarity with local conditions in the Philippine Islands which I do not possess, such want of knowledge at once additionally admonishes me of the wrong to arise from forming a judgment upon insufficient data or without a knowledge of the subject-matter upon which the judgment is to be exerted. Strength, indeed, is added to this last suggestion by the fact that no question concerning the subject was raised in the courts below or there considered, and, therefore, no opportunity was afforded those courts, presumably, at least, relatively familiar with the local

conditions, to express their views as to the considerations which may have led to the prescribing of the punishment in question. Turning aside, therefore, from mere emotional tendencies and guiding my judgment alone by the aid of the reason at my command, I am unable to agree with the ruling of the court. As, in my opinion, that ruling rests upon an interpretation of the cruel and unusual punishment clause of the Eighth Amendment, never before announced, which is repugnant to the natural import of the language employed in the clause, and which interpretation curtails the legislative power of Congress to define and punish crime by asserting a right of judicial supervision over the exertion of that power, in disregard of the distinction between the legislative and judicial departments of the Government, I deem it my duty to dissent and state my reasons.

To perform this duty requires at the outset a precise statement of the construction given by the ruling now made to the provision of the Eighth Amendment. My inability to do this must, however, be confessed, because I find it impossible to fix with precision the meaning which the court gives to that provision. Not for the purpose of criticising, but solely in order to indicate my perplexity on the subject, the reasons for my doubt are briefly given. Thus to my mind it appears as follows: First. That the court interprets the inhibition against cruel and unusual punishment as imposing upon Congress the duty of proportioning punishment according to the nature of the crime, and casts upon the judiciary the duty of determining whether punishments have been properly apportioned in a particular statute, and if not to decline to enforce it. This seems to me to be the case, because of the reference made by the court to the harshness of the principal punishment (im-prisonment), and its comments as to what it deems to be the severity, if not inhumanity, of the accessories which result from or accompany it, and the declaration in substance that these things offend against the just principle of proportioning punishment to the nature of the crime punished, stated to be a

fundamental precept of justice and of American criminal law. That this is the view now upheld, it seems to me, is additionally demonstrated by the fact that the punishment for the crime in question as imposed by the Philippine law is compared with other Philippine punishments for crimes deemed to be less heinous, and the conclusion is deduced that this fact in and of itself serves to establish that the punishment imposed in this case is an exertion of unrestrained power condemned by the cruel and unusual punishment clause.

Second. That this duty of apportionment compels not only that the lawmaking power should adequately apportion punishment for the crimes as to which it legislates, but also further exacts that the performance of the duty of apportionment must be discharged by taking into view the standards, whether lenient or severe, existing in other and distinct jurisdictions, and that a failure to do so authorizes the courts to consider such standards in their discretion and judge of the validity of the law accordingly. I say this because, although the court expressly declares in the opinion, when considering a case decided by the highest court of one of the Territories of the United States, that the legislative power to define and punish crime committed in a Territory, for the purpose of the Eighth Amendment, is separate and distinct from the legislation of Congress, yet in testing the validity of the punishment affixed by the law here in question, proceeds to measure it not alone by the Philippine legislation, but by the provisions of several acts of Congress punishing crime and in substance declares such Congressional laws to be a proper standard, and in effect holds that the greater proportionate punishment inflicted by the Philippine law over the more lenient punishments prescribed in the laws of Congress establishes that the Philippine law is repugnant to the Eighth Amendment.

Third. That the cruel and unusual punishment clause of the Eighth Amendment controls not only the exertion of legislative power as to modes of punishment, proportionate or otherwise, but addresses itself also to the mainspring of the

legislative motives in enacting legislation punishing crime in a particular case, and therefore confers upon courts the power to refuse to enforce a particular law defining and punishing crime if in their opinion such law does not manifest that the lawmaking power, in fixing the punishment, was sufficiently impelled by a purpose to effect a reformation of the criminal. This is said because of the statements contained in the opinion of the court as to the legislative duty to shape legislation not only with a view to punish but to reform the criminal, and the inferences which I deduce that it is conceived that the failure to do so is a violation of constitutional duty.

Fourth. That the cruel and unusual punishment clause does not merely limit the legislative power to fix the punishment for crime by excepting out of that authority the right to impose bodily punishments of a cruel kind, in the strict acceptation of those terms, but limits the legislative discretion in determining to what degree of severity an appropriate and usual mode of punishment may in a particular case be inflicted, and therefore endows the courts with the right to supervise the exercise of legislative discretion as to the adequacy of punishment, even although resort is had only to authorized kinds of punishment, thereby endowing the courts with the power to refuse to enforce laws punishing crime if in the judicial judgment the legislative branch of the Government has prescribed a too severe punishment.

Not being able to assent to these, as it to me seems, in some respects conflicting, or at all events widely divergent propositions, I shall consider them all as sanctioned by the interpretation now given to the prohibition of the Eighth Amendment, and with this conception in mind shall consider the subject.

Before approaching the text of the Eighth Amendment to determine its true meaning let me briefly point out why in my opinion it cannot have the significance which it must receive to sustain the propositions rested upon it. In the first place, if it be that the lawmaker in defining and punishing crime is imperatively restrained by constitutional provisions to apportion

WHITE, J., dissenting.

217 U. S.

punishment by a consideration alone of the abstract heinousness of the offenses punished, it must result that the power is so circumscribed as to be impossible of execution, or at all events is so restricted as to exclude the possibility of taking into account in defining and punishing crime all those considerations concerning the condition of society, the tendency to commit the particular crime, the difficulty of detecting the same, the necessity for resorting to stern measures of repression, and various other subjects which have at all times been deemed essential to be weighed in defining and punishing crime. And certainly the paralysis of the discretion vested in the law-making authority which the propositions accomplish is immeasurably magnified when it is considered that this duty of proportioning punishment requires the taking into account of the standards prevailing in other or different countries or jurisdictions, thereby at once exacting that legislation on the subject of crime must be proportioned, not to the conditions to which it is intended to apply, but must be based upon conditions with which the legislation when enacted will have no relation or concern whatever. And when it is considered that the propositions go further and insist that if the legislation seems to the judicial mind not to have been sufficiently impelled by motives of reformation of the criminal, such legislation defining and punishing crime is to be held repugnant to constitutional limitations, the impotency of the legislative power to define and punish crime is made manifest. When to this result is added the consideration that the interpretation by its necessary effect does not simply cause the cruel and unusual punishment clause to carve out of the domain of legislative authority the power to resort to prohibited kinds of punishments, but subjects to judicial control, the degree of severity with which authorized modes of punishment may be inflicted, it seems to me that the demonstration is conclusive that nothing will be left of the independent legislative power to punish and define crime, if the interpretation now made be pushed in future application to its logical conclusion.

But let me come to the Eighth Amendment, for the purpose of stating why the clause in question does not, in my opinion, authorize the deductions drawn from it, and therefore does not sanction the ruling now made.

I shall consider the Amendment *a*, as to its origin in the mother country and the meaning there given to it prior to the American Revolution; *b*, its migration and existence in the States after the Revolution and prior to the adoption of the Constitution; *c*, its incorporation into the Constitution and the construction given to it in practice from the beginning to this time; and, *d*, the judicial interpretation which it has received, associated with the construction affixed, both in practice and judicially, to the same provision found in various state constitutions or bills of rights.

Without going into unnecessary historical detail, it is sufficient to point out, as did the court in *In re Kemmler*, 136 U. S. 436, 446, that "the provision in reference to cruel and unusual punishments was taken from the well-known act of Parliament of 1688, entitled An act declaring the rights and liberties of the subject and settling the succession of the crown." And this act, it is to be observed, was but in regular form a crystallization of the declaration of rights of the same year. Hallam, *Const. Hist.*, vol. 3, p. 106. It is also certain, as declared in the *Kemmler case*, that "this declaration of rights had reference to the acts of the executive and judicial departments of the government of England," since it but embodied the grievances which it was deemed had been suffered by the usurpations of the crown and transgressions of authority by the courts. In the recitals, both in the declaration of rights and the bill of rights, the grievances complained of were that illegal and cruel punishments had been inflicted, "which are utterly and directly contrary to the known laws and statutes and freedom of this realm," while in both the declaration and the bill of rights the remedy formulated was a declaration against the infliction of cruel and unusual punishments.

Whatever may be the difficulty, if any, in fixing the mean-

WHITE, J., dissenting.

217 U. S.

ing of the prohibition at its origin, it may not be doubted, and indeed is not questioned by any one, that the cruel punishments against which the bill of rights provided were the atrocious, sanguinary and inhuman punishments which had been inflicted in the past upon the persons of criminals. This being certain, the difficulty of interpretation, if any is involved, in determining what was intended by the unusual punishments referred to and which were provided against. Light, however, on this subject is at once afforded by observing that the unusual punishments provided against were responsive to and obviously considered to be the illegal punishments complained of. These complaints were, first, that customary modes of bodily punishments, such as whipping and the pillory, had, under the exercise of judicial discretion, been applied to so unusual a degree as to cause them to be illegal; and, second, that in some cases an authority to sentence to perpetual imprisonment had been exerted under the assumption that power to do so resulted from the existence of judicial discretion to sentence to imprisonment, when it was unusual, and therefore illegal, to inflict life imprisonment in the absence of express legislative authority. In other words, the prohibitions, although conjunctively stated, were really disjunctive, and embraced as follows: *a*, Prohibitions against a resort to the inhuman bodily punishments of the past; *b*, or, where certain bodily punishments were customary, a prohibition against their infliction to such an extent as to be unusual and consequently illegal; *c*, or the infliction, under the assumption of the exercise of judicial discretion, of unusual punishments not bodily which could not be imposed except by express statute, or which were wholly beyond the jurisdiction of the court to impose.

The scope and power of the guarantee as we have thus stated it will be found portrayed in the reasons assigned by the members of the House of Lords who dissented against two judgments for perjury entered in the King's Bench against Titus Oates. 10 Howell's State Trials, col. 1325.

217 U. S.

WHITE, J., dissenting.

The judgments and the dissenting reasons are copied in the margin.¹

As well the dissent referred to as the report of the conferees

¹ Judgment against Titus Oates upon conviction upon two indictments for perjury, as announced by the court, (10 Howell's State Trials, col. 1316-1317 & 1325).

"First, The Court does order for a fine, that you pay 1000 marks upon each Indictment.

"Secondly, That you be stript of all your Canonical Habits.

"Thirdly, The Court does award, That you do stand upon the Pillory, and in the Pillory, here before Westminster-hall gate, upon Monday next, for an hour's time, between the hours of 10 and 12; with a paper over your head (which you must first walk with round about to all the Courts in Westminster-hall) declaring your crime. And that is upon the first Indictment.

"Fourthly, (on the Second Indictment), upon Tuesday, you shall stand upon, and in the Pillory, at the Royal Exchange in London, for the space of an hour, between the hours of twelve and two; with the same inscription.

"You shall upon the next Wednesday be whipped from Aldgate to Newgate.

"Upon Friday, you shall be whipped from Newgate to Tyburn, by the hands of the common hangman.

"But, Mr. Oates, we cannot but remember, there were several particular times you swore false about; and therefore, as annual commemorations, that it may be known to all people as long as you live, we have taken special care of you for an annual punishment.

"Upon the 24th of April every year, as long as you live, you are to stand upon the Pillory and in the Pillory, at Tyburn, just opposite to the gallows, for the space of an hour, between the hours of ten and twelve.

"You are to stand upon, and in the Pillory, here at Westminster-hall gate, every 9th of August, in every year, so long as you live. And that it may be known what we mean by it, 'tis to remember, what he swore about Mr. Ireland's being in town between the 8th and 12th of August.

"You are to stand upon, and in the Pillory, at Charing-cross, on the 10th of August, every year, during your life, for an hour, between ten and twelve.

"The like over-against the Temple gate, upon the 11th.

"And upon the 2d of September, (which is another notorious time,

on the part of the House of Commons, made to that body concerning a bill to set aside the judgments against Oates above referred to, (Cobbett's Parl. History, vol. V, col. 386), proceeded upon the identity of what was deemed to be the illegal practises complained of and which were intended to be rectified by the prohibition against cruel and unusual punishments

which you cannot but be remember'd of) you are to stand upon, and in the Pillory, for the space of one hour, between twelve and two, at the Royal Exchange; and all this you are to do every year, during your life; and to be committed close prisoner, as long as you live."

Dissenting statement of a minority of the House of Lords:

"1. For that the king's bench, being a temporal court, made it part of the judgment, that Titus Oates, being a clerk, should for his said perjuries, be divested of his canonical and priestly habit, and to continue divested all his life; which is a matter wholly out of their power, belonging to the ecclesiastical courts only.

"2. For that the said judgments are barbarous, inhuman, and unchristian; and there is no precedents to warrant the punishments of whipping and committing to prison for life, for the crime of perjury; which yet were but part of the punishments inflicted upon him.

"3. For that the particular matters upon which the indictments were found, were the points objected against Mr. Titus Oates' testimony in several of the trials, in which he was allowed to be a good and credible witness, though testified against him by most of the same persons, who witnessed against him upon those indictments.

"4. For that this will be an encouragement and allowance for giving the like cruel, barbarous, and illegal judgments hereafter, unless this judgment be reversed.

"5. Because sir John Holt, sir Henry Pollexfen, the two chief justices, and sir Robert Atkins chief baron, with six judges more (being all that where then present), for these and many other reasons, did, before us, solemnly deliver their opinions, and unanimously declare, That the said judgments were contrary to law and ancient practice, and therefore erroneous, and ought to be reversed.

"6. Because it is contrary to the declaration on the twelfth of February last, which was ordered by the Lords Spiritual and Temporal and Commons then assembled, and by their declaration engrossed in parchment, and enrolled among the records of parliament, and recorded in chancery; whereby it doth appear, that excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted."

made in the declaration of rights, and treated that prohibition, as already stated, as substantially disjunctive, and as forbidding the doing of the things we have above enumerated. See, for the disjunctive character of the provision, Stephen, *Comm. Law of England*, 15th ed., p. 379.

When the origin and purpose of the declaration and the bill of rights is thus fixed it becomes clear that that declaration is not susceptible of the meaning now attributed to the same language found in the Constitution of the United States. That in England it was nowhere deemed that any theory of proportional punishment was suggested by the bill of rights or that a protest was thereby intended against the severity of punishments, speaking generally, is demonstrated by the practise which prevailed in England as to punishing crime from the time of the bill of rights to the time of the American Revolution. Speaking on this subject, Stephen, in his history of the criminal law of England, vol. 1, pp. 470-471, says:

"The severity of the criminal law was greatly increased all through the eighteenth century by the creation of new felonies without benefit of clergy. . . . However, after making all deductions on these grounds, there can be no doubt that the legislation of the eighteenth century in criminal matters was severe to the highest degree, and destitute of any sort of principle or system."

For the sake of brevity a review of the practises which prevailed in the colonial period will not be referred to. Therefore, attention is at once directed to the express guarantees in certain of the state constitutions adopted after the Declaration of Independence and prior to the formation of the Constitution of the United States, and the circumstances connected with the subsequent adoption of the Eighth Amendment.

In 1776, Maryland, in a bill of rights declared (1 *Charters and Constitutions*, pp. 818, 819):

"XIV. That sanguinary laws ought to be avoided, as far as is consistent with the safety of the State; and no law to inflict

cruel and unusual pains and penalties ought to be made in any case, or at any time hereafter."

"XXII. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted, by the courts of law."

The constitution of North Carolina of 1776 in general terms prohibited the infliction of "cruel or unusual punishments."

Virginia, by § 9 of the bill of rights adopted in 1776, provided as follows:

"That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

In the Massachusetts declaration of rights of 1780 a direct prohibition was placed upon the infliction by magistrates or courts of cruel or unusual punishments, the provision being as follows:

"ART. XXVI. No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."

The declaration of rights of New Hampshire of 1784, was as follows:

"XVIII. All penalties ought to be proportioned to the nature of the offense. No wise legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason; where the same undistinguishing severity exerted is against all offenses; the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye: For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate, mankind."

"XXXIII. No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."

The substantial identity between the provisions of these several constitutions or bills of rights shows beyond doubt that

their meaning was understood, that is to say, that the significance attributed to them in the mother country as the result of the bill of rights of 1689 was appreciated, and that it was intended in using the identical words to give them the same well-understood meaning. It is to be observed that the New Hampshire bill of rights contains a clause admonishing as to the wisdom of the apportionment of punishment of crime according to the nature of the offense, but in marked contrast to the reënactment, in express and positive terms, of the cruel and unusual punishment clause of the English bill of rights, the provision as to apportionment is merely advisory, additionally demonstrating the precise and accurate conception then entertained of the nature and character of the prohibition adopted from the English bill of rights.

Undoubtedly, in the American States, prior to the formation of the Constitution, the necessity for the protection afforded by the cruel and unusual punishment guarantee of the English bill of rights had ceased to be a matter of concern, because as a rule the cruel bodily punishments of former times were no longer imposed, and judges, where moderate bodily punishment was usual, had not, under the guise of discretion, directed the infliction of such punishments to so unusual a degree as to transcend the limits of discretion and cause the punishment to be illegal, and had also not attempted, in virtue of mere discretion, to inflict such unusual and extreme punishments as had always been deemed proper to be inflicted only as the result of express statutory authority. Despite these considerations, it is true that some of the solicitude which arose after the submission of the Constitution for ratification, and which threatened to delay or prevent such ratification, in part at least was occasioned by the failure to guarantee against the infliction of cruel and unusual punishments. Thus, in the Massachusetts convention, Mr. Holmes, discussing the general result of the judicial powers conferred by the Constitution and referring to the right of Congress to define and fix the punishment for crime, said (2 El. Deb. 111):

"They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline."

That the opposition to the ratification in the Virginia convention was earnestly and eloquently voiced by Patrick Henry is too well known to require anything but statement. That the absence of a guarantee against cruel and unusual punishment was one of the causes of the solicitude by which Henry was possessed is shown by the debates in that convention. Thus Patrick Henry said (3 El. Deb. 447):

"In this business of legislation, your members of Congress will lose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors? That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain and Germany—of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone. And can any man think it troublesome when we can by a small interference prevent our rights from being lost? If you will, like the Virginian government, give them knowledge of the extent of the rights retained by the people, and the powers of themselves, they will, if they be honest men, thank you for it. Will they not wish to go on sure grounds? But, if you leave them otherwise, they will not know how to proceed; and, being in a state of uncertainty, they will assume rather than give up powers by implication."

These observations, it is plainly to be seen, were addressed to the fear of the repetition either by the sanction of law or by the practice of courts, of the barbarous modes of bodily punishment or torture, the protest against which was embodied in the bill of rights in 1689.

The ultimate recognition by Henry of the patriotic duty to ratify the Constitution and trust to the subsequent adoption of a bill of rights, the submission and adoption of the first ten amendments as a bill of rights which followed ratification, the connection of Mr. Madison with the drafting of the amendments, and the fact that the Eighth Amendment is in the precise words of the guarantee on that subject in the Virginia bill of rights, would seem to make it perfectly clear that it was only intended by that Amendment to remedy the wrongs which had been provided against in the English bill of rights, and which were likewise provided against in the Virginia provision, and therefore were intended to guard against the evils so vividly portrayed by Henry in the debate which we have quoted. That this was the common understanding which must have existed on the subject is plainly to be inferred from the fact that the Eighth Amendment was substantially submitted by Congress without any debate on the subject. 2 Elliot's Deb. 225. Of course, in view of the nature and character of the government which the Constitution called into being, the incorporation of the Eighth Amendment caused its provisions to operate a direct and controlling prohibition upon the legislative branch (as well as all other departments), restraining it from authorizing or directing the infliction of the cruel bodily punishments of the past, which was one of the evils sought to be prevented for the future by the English bill of rights, and also restrained the courts from exerting and Congress from empowering them to select and exert by way of discretion modes of punishment which were not usual, or usual modes of punishment to a degree not usual and which could alone be imposed by express authority of law. But this obvious result lends no

support to the theory that the adoption of the Amendment operated or was intended to prevent the legislative branch of the Government from prescribing, according to its conception of what public policy required, such punishments, severe or otherwise, as it deemed necessary for the prevention of crime, provided only resort was not had to the infliction of bodily punishments of a cruel and barbarous character against which the Amendment expressly provided. Not to so conclude is to hold that because the Amendment in addition to depriving the lawmaking power of the right to authorize the infliction of cruel bodily punishments had restricted the courts, where discretion was possessed by them, from exerting the power to punish by a mode or in a manner so unusual as to require legislative sanction, it thereby deprived Congress of the power to sanction the punishments which the Amendment forbade being imposed merely because they were not sanctioned. In other words, that because the power was denied to the judiciary to do certain things without legislative authority, thereby the right on the part of the legislature to confer the authority was taken away. And this impossible conclusion would lead to the equally impossible result that the effect of the Amendment was to deprive Congress of its legitimate authority to punish crime, by prescribing such modes of punishment, even although not before employed, as were appropriate for the purpose.

That no such meaning as is now ascribed to the Amendment was attributed to it at the time of its adoption is shown by the fact that not a single suggestion that it had such a meaning is pointed to, and that on the other hand the practise from the very beginning shows directly to the contrary and demonstrates that the very Congress that adopted the Amendment construed it in practice as I have construed it. This is so, since the first crimes act of the United States prescribed a punishment for crime utterly without reference to any assumed rule of proportion or of a conception of a right in the judiciary to supervise the action of Congress in respect to

the severity of punishment, excluding always the right to impose as a punishment the cruel bodily punishments which were prohibited. What clearer demonstration can there be of this than the statement made by this court in *Ex parte Wilson*, 114 U. S. 427, of the nature of the first crimes act, as follows:

"By the first Crimes Act of the United States, forgery of public securities, or knowingly uttering forged public securities with intent to defraud, as well as treason, murder, piracy, mutiny, robbery, or rescue of a person convicted of a capital crime, was punishable with death; most other offences were punished by fine and imprisonment; whipping was part of the punishment of stealing or falsifying records, fraudulently acknowledging bail, larceny of goods, or receiving stolen goods; disqualification to hold office was part of the punishment of bribery; and those convicted of perjury or subordination of perjury, besides being fined and imprisoned, were to stand in the pillory for one hour, and rendered incapable of testifying in any court of the United States. Act of April 30, 1790, ch. 9; 1 Stat. 112-117; Mr. Justice Wilson's Charge to the Grand Jury in 1791, 3 Wilson's Works, 380, 381."

And it is, I think, beyond power even of question that the legislation of Congress from the date of the first crimes act to the present time but exemplifies the truth of what has been said, since that legislation from time to time altered modes of punishment, increasing or diminishing the amount of punishment as was deemed necessary for the public good, prescribing punishments of a new character, without reference to any assumed rule of apportionment or the conception that a right of judicial supervision was deemed to obtain. It is impossible with any regard for brevity to demonstrate these statements by many illustrations. But let me give a sample from legislation enacted by Congress of the change of punishment. By § 14 of the first crimes act (Art. April 30, 1790, ch. 9, 1 Stat. 115), forgery, etc., of the public securities of the United States, or the knowingly ut-

tering and offering for sale of forged or counterfeited securities of the United States with intent to defraud, was made punishable by death. The punishment now is a fine of not more than \$5,000, and imprisonment at hard labor for not more than fifteen years. Rev. Stat., § 5414.

By the first crimes act also, as in numerous others since that time, various additional punishments for the commission of crime were imposed, prescribing disqualification to hold office, to be a witness in the courts, etc., and as late as 1865 a law was enacted by Congress which prescribed as a punishment for crime the disqualification to enjoy rights of citizenship. Rev. Stat., §§ 1996, 1997, 1998.

Comprehensively looking at the rulings of this court,¹ it may be conceded that hitherto they have not definitely interpreted the precise meaning of the clause in question, because in most of the cases in which the protection of the Amendment has been invoked the cases came from courts of last resort of States, and the opinions leave room for the contention that they proceeded upon the implied assumption that the Eighth Amendment did not govern the States by virtue of the adoption of the Fourteenth Amendment. However, in *Wilkerson v. Utah*, 99 U. S. 130, a case coming to this court from the Territory of Utah, the meaning of the clause of the Eighth Amendment in question came directly under review. The question for decision was whether a sentence to death by shooting, which had been imposed by the court under the assumed exercise of a discretionary power to fix the mode of execution of the sentence, was repugnant to the clause. While the court in deciding that it was not, did not undertake to fully interpret the meaning of the clause, it nevertheless, reasoning by exclusion, expressly negatived the construction now placed upon it. It was said (pp. 135-136):

¹ *Pervair v. Massachusetts*, 5 Wall. 475; *Wilkerson v. Utah*, 99 U. S. 130; *In re Kemmler*, 136 U. S. 436; *McElvaine v. Brush*, 142 U. S. 155; *Howard v. Fleming*, 191 U. S. 126.

217 U. S.

WHITE, J., dissenting.

"Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution. Cooley, *Const. Lim.* (4th ed.), 408; Wharton, *Cr. L.* (7th ed.), sec. 3405."

And it was doubtless this ruling which caused the court subsequently to say in *In re Kemmler*, 136 U. S. 436, 447:

"Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."

Generally viewing the action of the States in their bills of right as to the prohibition against inhuman or cruel and unusual punishments, it is true to say that those provisions substantially conform to the English bill of rights and to the provision of the Eighth Amendment we are considering, some using the expression cruel and unusual, others the more accurate expression cruel or unusual, and some cruel only, and in a few instances a provision requiring punishments to be proportioned to the nature of the offense is added to the inhibition against cruel and unusual punishments. In one (Illinois) the prohibition against cruel and unusual punishments is not expressed, although proportional punishment is commanded, yet in *Kelley v. The People*, 115 Illinois, 583, discussing the extent of punishment inflicted by a criminal statute, the Supreme Court of Illinois declared that "it would not be for the court to say the penalty was not proportioned to the nature of the offense." In another State (Ohio) where in the early constitution of the State proportionate punishment was conjoined with the cruel and unusual punishment provision, the proportionate provision was omitted in a later constitution.

Here, again, it is true to say, time forbidding my indulging in a review of the statutes, that the legislation of all the States is absolutely in conflict with and repugnant to the construction now given to the clause, since that legislation but exemplifies the exertion of legislative power to define and punish crime according to the legislative conception of the necessities of the situation, without the slightest indication of the assumed duty to proportion punishments, and without the suggestion of the existence of judicial power to control the legislative discretion, provided only that the cruel bodily punishments forbidden were not resorted to. And the decisions of the state courts of last resort, it seems to me, with absolute uniformity and without a single exception from the beginning, proceed upon this conception. It is true that when the reasoning employed in the various cases is critically examined a difference of conception will be manifested as to the occasion for the adoption of the English bill of rights and of the remedy which it provided. Generally speaking, when carefully analyzed, it will be seen that this difference was occasioned by treating the provision against cruel and unusual punishment as conjunctive instead of disjunctive, thereby overlooking the fact, which I think has been previously demonstrated to be the case, that the term unusual, as used in the clause, was not a qualification of the provision against cruel punishments, but was simply synonymous with illegal, and was mainly intended to restrain the courts, under the guise of discretion, from indulging in an unusual and consequently illegal exertion of power. Certain it is, however, whatever may be these differences of reasoning, there stands out in bold relief in the State cases, as it is given to me to understand them, without a single exception, the clear and certain exclusion of any prohibition upon the lawmaking power to determine the adequacy with which crime shall be punished, provided only the cruel bodily punishments of the past are not resorted to. Let me briefly refer to some of the cases.

In *Aldridge v. Commonwealth*, 2 Va. Cas. 447, decided about twenty years after the ratification of the Eighth Amendment, speaking concerning the evils to which the guarantee of the Virginia bill of rights against cruel and unusual punishments was addressed, the court, after referring to the punishments usually applicable in that State to crime at the time of the adoption of the bill of rights of Virginia, said (p. 450):

"We consider these sanctions as sufficiently rigorous, and we knew that the best heads and hearts of the land of our ancestors had long and loudly declaimed against the wanton cruelty of many of the punishments practiced in other countries; and this section in the bill of rights was framed effectually to exclude these, so that no future legislature, in a moment perhaps of great and general excitement, should be tempted to disgrace our code by the introduction of any of those odious modes of punishment."

And, four years later, in 1828, applying the same doctrine in *Commonwealth v. Wyatt*, 6 Rand. 694, where a punishment by whipping was challenged as contrary to the Virginia bill of rights, the court said (p. 700): "The punishment of offenses by stripes is certainly odious, but cannot be said to be unusual."

Until 1865 there was no provision in the constitution of Georgia expressly guaranteeing against cruel and unusual punishments. The constitution of that year, however, contained a clause identical in terms with the Eighth Amendment, and the scope of the guarantee arose for decision in 1872 in *Whitten v. State*, 47 Georgia, 297. The case was this: Upon a conviction for assault and battery Whitten had been sentenced to imprisonment or the payment of a fine of \$250 and costs. The contention was that this sentence was so disproportionate to the offense committed as to be cruel and unusual and repugnant to the guarantee. In one of its immediate aspects the case involved the guarantee against excessive fines, but as the imprisonment was the coercive means for the payment of the fine, in that aspect the case

WHITE, J., dissenting.

217 U. S.

involved the cruel and unusual punishment clause, and the court so considered, and, in coming to interpret the clause said (p. 301):

"Whether the law is unconstitutional, a violation of that article of the Constitution which declares excessive fines shall not be imposed nor cruel and unusual punishments inflicted, is another question. The latter clause was, doubtless, intended to prohibit the barbarities of quartering, hanging in chains, castration, etc. When adopted by the framers of the Constitution of the United States, larceny was generally punished by hanging; forgeries, burglaries, etc., in the same way, for, be it remembered, penitentiaries are of modern origin, and I doubt if it ever entered into the mind of men of that day that a crime such as this witness makes the defendant guilty of deserved a less penalty than the judge has inflicted. It would be an interference with matters left by the Constitution to the legislative department of the government for us to undertake to weigh the propriety of this or that penalty fixed by the legislature for specific offenses. So long as they do not provide cruel and unusual punishments, such as disgraced the civilization of former ages, and made one shudder with horror to read of them, as drawing, quartering, burning, etc., the Constitution does not put any limit upon legislative discretion."

In *State v. White* (1890), 44 Kansas, 514, it was sought to reverse a sentence of five years' imprisonment in the penitentiary, imposed upon a boy of sixteen for statutory rape. The girl was aged sixteen, and had consented. It was contended that if the statute applied it was unconstitutional and void, "for the reason that it conflicts with section 9 of the bill of rights, because it inflicts cruel and unusual punishment, and is in conflict with the spirit of the bill of rights generally, and is in violation of common sense, common reason, and common justice."

The court severely criticised the statute. After deciding that the offense was embraced in the statute, the court said:

"With respect to the severity of the punishment, while we think it is true that it is a severer one than has ever before been provided for in any other State or county for such an offense, yet we cannot say that the statute is void for that reason. Imprisonment in the penitentiary at hard labor is not of itself a cruel or unusual punishment, within the meaning of section 9 of the bill of rights of the Constitution, for it is a kind of punishment which has been resorted to ever since Kansas has had any existence, and is a kind of punishment common in all civilized countries. That section of the Constitution probably, however, relates to the kind of punishment to be inflicted, and not to its duration. Although the punishment in this case may be considered severe, and much severer indeed than the punishment for offenses of much greater magnitude, as adultery, or sexual intercourse coupled with seduction, yet we cannot say that the act providing for it is unconstitutional or void."

In *State v. Hogan* (1900), 63 Ohio St. 218, the court sustained a "tramp law," which prescribed, as the punishment to be imposed on a tramp for threatening to do injury to the person of another, imprisonment in the penitentiary not more than three years nor less than one year. In the course of the opinion the court said:

"The objection that the act prescribes a cruel and unusual punishment we think not well taken. Imprisonment at hard labor is neither cruel nor unusual. It may be severe in the given instance, but that is a question for the lawmaking power. *In re Kemmler*, 136 U. S. 436; *Cornelison v. Com.*, 84 Kentucky, 583. The punishment, to be effective, should be such as will prove a deterrent. The tramp cares nothing for a jail sentence. Often he courts it. A workhouse sentence is less welcome, but there are but few workhouses in the State. A penitentiary sentence is a real punishment. There he has to work, and cannot shirk."

In Minnesota a register of deeds was convicted of misappropriating the sum of \$62.50, which should have been turned

over by him to the county treasurer. He was sentenced to pay a fine of \$500 and be imprisoned at hard labor for one year. The contention that the sentence was repugnant to the state constitutional guarantee against cruel and unusual punishment was considered and disposed of by the court in *State v. Borgstrom*, 69 Minnesota, 508, 520. Among other things the court said:

"It is claimed that the sentence imposed was altogether disproportionate to the offense charged, and of which the defendant was convicted, and comes within the inhibition of Const. art. 1, § 5, that no cruel or unusual punishments be inflicted. . . . We are not unmindful of the importance of this question, and have given to it that serious and thorough examination which such importance demands. . . . In England there was a time when punishment was by torture, by loading him with weights to make him confess. Traitors were condemned to be drowned, disemboweled, or burned. It was the 'law that the offender shall be drawn, or rather dragged, to the gallows; he shall be hanged and cut down alive; his entrails shall be removed and burned while he yet lives; his head shall be decapitated; his body divided into four parts.' Browne, Bl. Comm. 617. For certain other offenses the offender was punished by cutting off the hands or ears, or boiling in oil, or putting in the pillory. By the Roman law a parricide was punished by being sewed up in a leather sack with a live dog, a cock, a viper, and an ape, and cast into the sea. These punishments may properly be termed cruel, but happily the more humane spirit of this nation does not permit such punishment to be inflicted upon criminals. Such punishments are not warranted by the laws of nature or society, and we find that they are prohibited by our Constitution. But, within this limitation or restriction, the legislature is ordinarily the judge of the expediency of creating new crimes and of prescribing the penalty. . . . While the amount of money misappropriated in this instance was not great, the legislature evidently had in mind the fact that the misappropriation by a

217 U. S.

WHITE, J., dissenting.

public official of the public money was destructive of the public rights and the stability of our government. But fine and imprisonment are not ordinarily cruel and unusual punishments. . . .”

In *Territory v. Ketchum*, 10 N. M. 721, the court considered whether a statute which had recently been put in force and which imposed the death penalty instead of a former punishment of imprisonment, for an attempt at train robbery, was cruel and unusual. In sustaining the validity of the law the court pointed out the conditions of society which presumably had led the lawmaking power to fix the stern penalty, and after a lengthy discussion of the subject it was held that the law did not impose punishment which was cruel or unusual.

The cases just reviewed are typical, and I therefore content myself with noting in the margin many others to the same general effect.¹

In stating, as I have done, that in my opinion no case could be found sustaining the proposition which the court now

¹ Cases decided in state and territorial courts of last resort, involving the question whether particular punishments were cruel and unusual: *Ex parte Mitchell*, 70 California, 1; *People v. Clark*, 106 California, 32; *Fogarty v. State*, 80 Georgia, 450; *Kelley v. State*, 115 Illinois, 583; *Hobbs v. State*, 133 Indiana, 404; *State v. Teeters*, 97 Iowa, 458; *In re Tutt*, 55 Kansas, 705; *Cornelison v. Commonwealth*, 84 Kentucky, 583, 608; *Harper v. Commonwealth*, 93 Kentucky, 290; *State v. Baker*, 105 Louisiana, 378; *Foot v. State*, 59 Maryland, 264, 267; *Commonwealth v. Hitchings*, 5 Gray, 482; *McDonald v. Commonwealth*, 173 Massachusetts, 322; *Luton v. Newaygo Circuit Judge*, 69 Michigan, 610; *People v. Morris*, 80 Michigan, 637; *People v. Smith*, 94 Michigan, 644; *People v. Whitney*, 105 Michigan, 622; *Dummer v. Nungesser*, 107 Michigan, 481; *People v. Huntley*, 112 Michigan, 569; *State v. Williams*, 77 Missouri, 310; *Ex parte Swann*, 96 Missouri, 44; *State v. Moore*, 121 Missouri, 514; *State v. Van Wye*, 136 Missouri, 227; *State v. Gedicke*, 14 Vroom, 86; *Garcia v. Territory*, 1 N. M. 415; *State v. Apple*, 121 N. C. 584; *State v. Barnes*, 3 N. D. 319; *State v. Becker*, 3 S. D. 29; *State v. Hodgson*, 66 Vermont, 134; *State v. De Lane*, 80 Wisconsin, 259; *State v. Fackler*, 91 Wisconsin, 418; *In re MacDonald*, 4 Wyoming, 150.

holds, I am of course not unmindful that a North Carolina case (*State v. Driver*, 78 N. C. 432) is cited by the court as authority, and that a Louisiana case (*State ex rel. Garvey et al. v. Whitaker, Recorder*, 48 La. Ann. 527) is sometimes referred to as of the same general tenor. A brief analysis of the *Driver case* will indicate why in my opinion it does not support the contention based upon it. In that case the accused was convicted of assault and battery, and sentenced to imprisonment for five years in the county jail. The offense was a common-law misdemeanor, and the punishment not being fixed by statute, as observed by the court (page 429), was left to the discretion of the judge. In testing whether the term of the sentence was unusual and therefore illegal, the court held that a long term of imprisonment in the county jail was unlawful because unusual, and was a gross abuse by the lower court of its discretion. Although the court made reference to the constitutional guarantee, there is not the slightest indication in its opinion that it was deemed there would have been power to set aside the sentence had it been inflicted by virtue of an express statutory command. But this aside, it seems to me as the test applied in the *Driver case* to determine what was an unusual punishment in North Carolina was necessarily so local in character that it affords no possible ground here for giving an erroneous meaning to the Eighth Amendment. I say this because an examination of the opinion will disclose that it proceeded upon a consideration of the disadvantages peculiar to an imprisonment in a county jail in North Carolina as compared with the greater advantages to arise from the imprisonment for a like term in the penitentiary, the court saying:

“Now, it is true our terms of imprisonment are much longer, but they are in the penitentiary, where a man may live and be made useful; but a county jail is a close prison, where life is soon in jeopardy, and where the prisoner is not only useless but a heavy public expense.”

As to the Louisiana case, I content myself with saying that it, in substance, involved merely the question of error com-

mitted by a magistrate in imposing punishment for many offenses when, under the law, the offense was a continuing and single one.

From all the considerations which have been stated I can deduce no ground whatever which to my mind sustains the interpretation now given to the cruel and unusual punishment clause. On the contrary, in my opinion, the review which has been made demonstrates that the word cruel, as used in the Amendment, forbids only the lawmaking power, in prescribing punishment for crime and the courts in imposing punishment from inflicting unnecessary bodily suffering through a resort to inhuman methods for causing bodily torture, like or which are of the nature of the cruel methods of bodily torture which had been made use of prior to the bill of rights of 1689, and against the recurrence of which the word cruel was used in that instrument. To illustrate. Death was a well-known method of punishment prescribed by law, and it was of course painful, and in that sense was cruel. But the infliction of this punishment was clearly not prohibited by the word cruel, although that word manifestly was intended to forbid the resort to barbarous and unnecessary methods of bodily torture, in executing even the penalty of death.

In my opinion the previous considerations also establish that the word unusual accomplished only three results: First, it primarily restrains the courts when acting under the authority of a general discretionary power to impose punishment, such as was possessed at common law, from inflicting lawful modes of punishment to so unusual a degree as to cause the punishment to be illegal because to that degree it cannot be inflicted without express statutory authority; second, it restrains the courts in the exercise of the same discretion from inflicting a mode of punishment so unusual as to be impliedly not within its discretion and to be consequently illegal in the absence of express statutory authority; and, third, as to both the foregoing it operated to restrain the lawmaking power from endowing the judiciary with the right to exert an illegal

discretion as to the kind and extent of punishment to be inflicted.

Nor is it given to me to see in what respect the construction thus stated minimizes the constitutional guarantee by causing it to become obsolete or ineffective in securing the purposes which led to its adoption. Of course, it may not be doubted that the provision against cruel bodily punishment is not restricted to the mere means used in the past to accomplish the prohibited result. The prohibition being generic, embraces all methods within its intendment. Thus, if it could be conceived that to-morrow the lawmaking power, instead of providing for the infliction of the death penalty by hanging, should command its infliction by burying alive, who could doubt that the law would be repugnant to the constitutional inhibition against cruel punishment? But while this consideration is obvious, it must be equally apparent that the prohibition against the infliction of cruel bodily torture cannot be extended so as to limit legislative discretion in prescribing punishment for crime by modes and methods which are not embraced within the prohibition against cruel bodily punishment, considered even in their most generic sense, without disregarding the elementary rules of construction which have prevailed from the beginning. Of course, the beneficent application of the Constitution to the ever-changing requirements of our national life has in a great measure resulted from the simple and general terms by which the powers created by the Constitution are conferred or in which the limitations which it provides are expressed. But this beneficent result has also essentially depended upon the fact that this court, while never hesitating to bring within the powers granted or to restrain by the limitations created all things generically within their embrace, has also incessantly declined to allow general words to be construed so as to include subjects not within their intendment. That these great results have been accomplished through the application by the court of the familiar rule that what is generically included in the words

employed in the Constitution is to be ascertained by considering their origin and their significance at the time of their adoption in the instrument may not be denied (*Boyd v. United States*, 116 U. S. 616, 624; *Kepner v. United States*, 195 U. S. 100, 124, 125), rulings which are directly repugnant to the conception that by judicial construction constitutional limitations may be made to progress so as to ultimately include that which they were not intended to embrace, a principle with which it seems to me the ruling now made is in direct conflict, since by the interpretation now adopted two results are accomplished: *a*, the clause against cruel punishments, which was intended to prohibit inhumane and barbarous bodily punishments, is so construed as to limit the discretion of the lawmaking power in determining the mere severity with which punishments not of the prohibited character may be prescribed, and, *b*, by interpreting the word unusual adopted for the sole purpose of limiting judicial discretion in order thereby to maintain the supremacy of the lawmaking power, so as to cause the prohibition to bring about the directly contrary result, that is, to expand the judicial power by endowing it with a vast authority to control the legislative department in the exercise of its discretion to define and punish crime.

But further than this, assuming for the sake of argument that I am wrong in my view of the Eighth Amendment, and that it endows the courts with the power to review the discretion of the lawmaking body in prescribing sentence of imprisonment for crime, I yet cannot agree with the conclusion reached in this case that because of the mere term of imprisonment it is within the rule. True, the imprisonment is at hard and painful labor. But certainly the mere qualification of painful in addition to hard cannot be the basis upon which it is now decided that the legislative discretion was abused, since to understand the meaning of the term requires a knowledge of the discipline prevailing in the prisons in the Philippine Islands. The division of hard labor into classes, one more irksome and it may be said more painful than the other in the

sense of severity, is well known. English Prisons Act of 1865, Pub. Gen. Stat., § 19, page 835. I do not assume that the mere fact that a chain is to be carried by the prisoner causes the punishment to be repugnant to the bill of rights, since while the chain may be irksome it is evidently not intended to prevent the performance of the penalty of hard labor. Such a provision may well be part of the ordinary prison discipline, particularly in communities where the jails are insecure, and it may be a precaution applied, as it is commonly applied in this country, as a means of preventing the escape of prisoners, for instance where the sentence imposed is to work on the roads or other work where escape might be likely. I am brought, then, to the conclusion that the accessory punishments are the basis of the ruling now made, that the legislative discretion was so abused as to cause it to be necessary to declare the law prescribing the punishment for the crime invalid. But I can see no foundation for this ruling, as to my mind these accessory punishments, even under the assumption, for the sake of argument, that they amounted to an abuse of legislative discretion, are clearly separable from the main punishment—imprisonment. Where a sentence is legal in one part and illegal in another it is not open to controversy that the illegal, if separable, may be disregarded and the legal enforced. *United States v. Pridgeon*, 153 U. S. 48. But it is said here the illegality is not merely in the sentence, but in the law which authorizes the sentence. Grant the premise. The illegal is capable of separation from the legal in the law as well as in the sentence, and because this is a criminal case it is none the less subject to the rule that where a statute is unconstitutional in part and in part not, the unconstitutional part, if separable, may be rejected and the constitutional part maintained. Of course it is true that that can only be done provided it can be assumed that the legislature would have enacted the legal part separate from the illegal. The ruling now made must therefore rest upon the proposition that because the law has provided an illegal in addition to a legal punish-

ment it must be assumed that the legislature would not have defined and punished the crime to the legal extent, because to some extent the legislature was mistaken as to its powers. But this I contend is to indulge in an assumption which is unwarranted and has been directly decided to the contrary at this term in *United States v. Union Supply Company*, 215 U. S. 50. In that case a corporation was proceeded against criminally for an offense punishable by imprisonment and fine. The corporation clearly could not be subjected to the imprisonment, and the contention was that the lawmaker must be presumed to have intended that both the punishments should be inflicted upon the person violating the law, and therefore it could not be intended to include a corporation within its terms. In overruling the contention it was said (p. 55):

"And if we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule, the natural inference, when a statute prescribes two independent penalties, is that it means to inflict them so far as it can, and that if one of them is impossible, it does not mean on that account to let the defendant escape."

I am authorized to say that MR. JUSTICE HOLMES concurs in this dissent.